

APPENDIX

"Sec. 1377. Abstract. Each auditor shall, on or before the third Monday in June, make out, and transmit to the auditor of state an abstract of the real and personal property in his county, in which he shall set forth:

1. The number of acres of land and the aggregate actual and taxable values of the same, exclusive of town lots, returned by the assessors, as corrected by the county board of review;

2. The aggregate actual and taxable values of real estate in each township, city and town in the county, returned as corrected by the county board of review;

3. The aggregate actual and taxable values of personal property;

4. An abstract as to the number and value of all animals as the same are returned by the assessor, showing the aggregate actual and taxable values and number of each kind or class, and such other facts as may be required by the state board of review."

"Sec. 1378. State board of review. The executive council shall constitute the state board of review, and shall meet at the seat of government on the second Monday of July in each year. The auditor of state shall be the clerk of the board, and shall lay before it the abstracts transmitted to him by the auditor, as required by the preceding section."

"Sec. 1379. Ch. 139, 37th G. A. Adjusting valuation in counties. It shall adjust the valuation of property of the several counties, adding to or deducting from the valuation of each kind or class of property such percentage in each case as will bring the same to its taxable value as fixed in this chapter, but before such executive council shall add to the valuation of any kind or class of property any such percentage, it shall serve ten days' notice by mail, on the auditor of the county whose valuation is proposed to be raised and shall hold an adjourned meeting after such ten days' notice, at which time such county may appear by its board of supervisors, county

attorney, or otherwise, and make written or oral protest against such proposed raise, which protest shall consist simply of a statement of the error, or errors, complained of with such facts as may lead to their correction, and at such adjourned meeting final action may be taken in reference thereto."

Office Supreme Court, U. S.

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NO. 23

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1924

THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY,

Appellant,

V.

NATHAN E. KENDALL, GOVERNOR OF THE
STATE OF IOWA, ET AL,

Appellees.

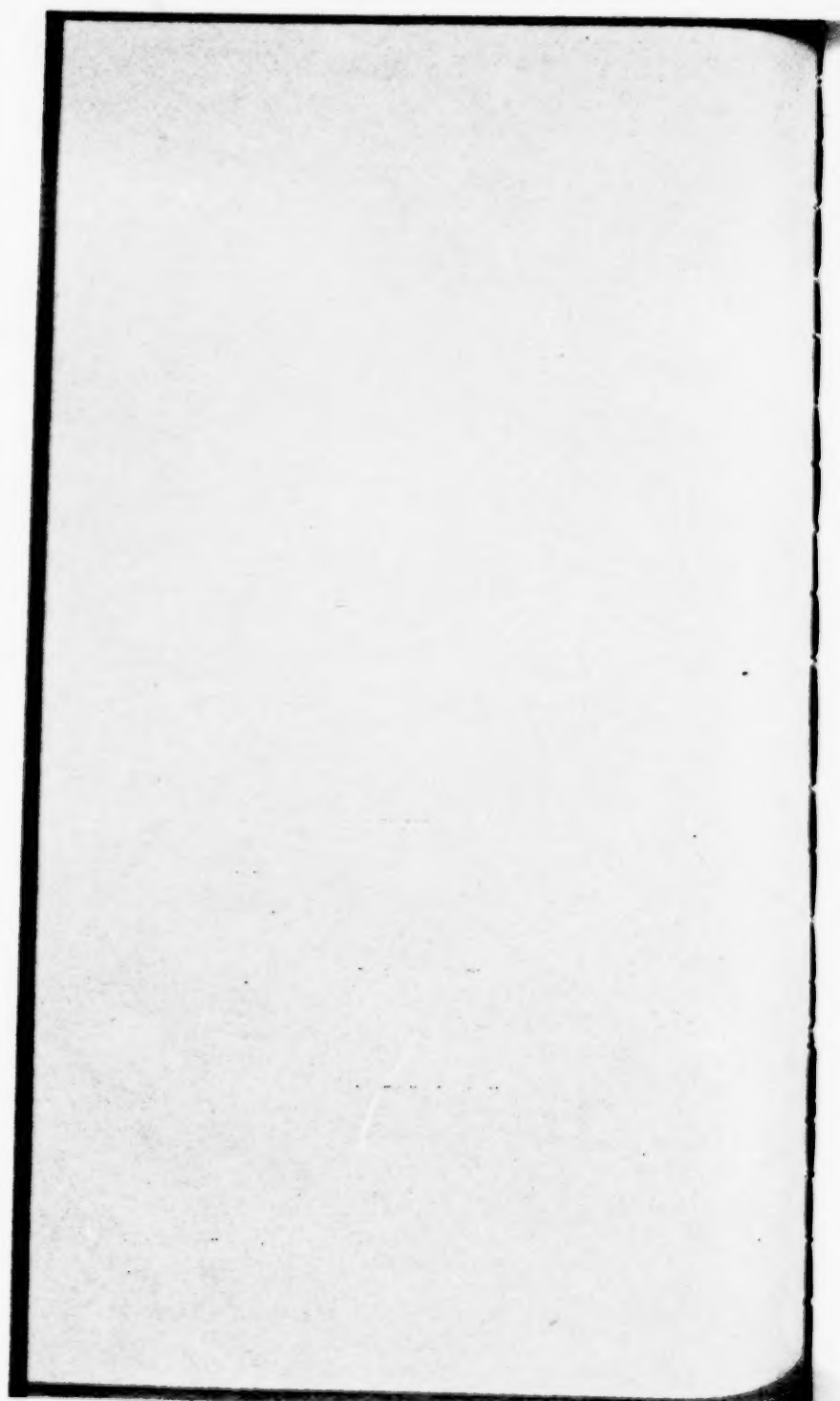
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF FOR APPELLEES.

BEN J. GIBSON, Attorney General,

NEILL GARRETT, Assistant Attorney General,

Counsel for Appellees.



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IN THE
**Supreme Court of the
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OCTOBER TERM, A. D. 1924.

THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY,

Appellant,

V.

NATHAN E. KENDALL, GOVERNOR OF THE
STATE OF IOWA, ET AL.

Appellees.

STATEMENT OF FACTS

This is an appeal from an order and decree of the District Court of the United States, for the Southern District of Iowa, constituted under the provisions of Section 266 of the Judicial Code, denying the application of the Appellant for a temporary injunction.

The Appellant filed in the District Court, its bill, challenging the validity of the assessment of its properties for the year 1922 by the Executive Council of Iowa.

Upon the filing of the bill, the District Court issued a temporary restraining order, restraining the Executive Council of Iowa from certifying, as provided by law, the assessment in question. Thereafter there was organ-

ized a three-judge court, composed of Kimbrough Stone, Circuit Judge, Thomas E. Munger and Martin J. Wade, District Judges. To this court the case was submitted. After evidence had been introduced and arguments heard, the court entered its written opinion, order and decree, denying a temporary injunction and dissolving the restraining order.

Thereafter and on the tenth day of November, 1922, this appeal was allowed and pending the appeal a supersedeas was granted staying eight per cent of the assessment, all conditioned upon the filing by the appellant of a bond conditioned upon the payment of the taxes finally determined to be legal, together with penalties and interest.

The bill of the appellant as filed in the District Court charges that farm lands have been assessed under the laws of Iowa systematically and continuously and in **conformity to a general scheme upon a basis of thirty-eight per cent of actual value**, whereas the Executive Council of Iowa intentionally and therefore fraudulently assessed the appellant's property in the year 1922 upon the basis of seventy-five per cent of actual value. There is no claim that the Executive Council of Iowa misinterpreted the law or applied a wrong method in finding the value of the appellant's property. The only claim is that it intentionally discriminated in applying a higher percentage of actual value to appellant's properties than to farm lands. The issues, the proofs and the facts are very carefully and simply stated by the three-judge court in its opinion rendered herein. We quote this opinion:

"These are hearings upon applications for temporary injunctions on separate bills filed by the Chicago, Rock Island & Pacific Railway Company, and

the Chicago Great Western Railroad Company, respectively. The applications were heard together and both will be covered in this opinion.

"These complainants challenge the validity of assessments for taxation of the railway property of complainants by the Executive Council of the State of Iowa. The Rock Island claims that farm lands are assessed at slightly over 38 per cent of actual value; that, with knowledge of this undervaluation of farm lands, the Executive Council intentionally assessed its property at 75 per cent of actual value. The Great Western claims the same as to farm lands and that its property was intentionally assessed at 115 per cent of actual value. A reduction in the valuation by the council, after the Great Western filed its bill, would reduce this claimed percentage slightly over 111.5 per cent of actual value.

"There is no claim that the council misinterpreted the law governing their action. The claim is that it intentionally discriminated in applying the law.

"There is no material difference between counsel on the point that if such intentional discrimination exists, under the Iowa laws, it may be examined and prevented by the courts. Allegations of violation of provisions of the Federal Constitution amply sustain the jurisdiction of this court. Such jurisdiction has been upheld in many cases, among which are: *Wallace v. Hines*, 253 U. S., 66; *Greene v. Ry.*, 244 U. S., 499; *Raymond v. Traction Co.*, 207 U. S., 20, and *State Railroad Tax Cases*, 92 U. S., 575. Therefore, this court has, under the allegations of the complainants, jurisdiction of these cases and must examine and determine them.

"At the threshold of this examination it is of vital importance to state the limits within which this inquiry must be confined. Assessment of taxes is essentially a legislative function. *State Railroad Tax Cases*, 92 U. S., 575, 615. Courts cannot act as boards of review to correct errors in legislative judgment. They act only to restrain legislative action to its legal boundaries. The Executive Council is clothed by the Statutes of Iowa with full power to determine the value of these railway properties for

general taxation purposes. This power, however, is restricted and defined by those statutes and by the state constitution. Of those restrictions, the ones here vital relate to quality of valuation. Because of differences in character, the statutory methods of determining value are different in the case of railroad property and of ordinary land and personal property. However, the statutes are clear that the ultimate aim and requirement is that property in each of the above classes shall be assessed at full actual value (Secs. 1305, 1334-A and 1336 Iowa Code.) The rate of taxation applicable to all of the above classes of property is the same, so that inequality of assessment results in inequality of taxation. It is not, however, every inequality of assessment which can be corrected by the courts. As said by Mr. Justice Miller (*State Railroad Tax Cases*, 92 U. S., 575, at 612), 'perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized.' And when the most perfect system is sought to be honestly applied to all the different classes and items of property in a great state like Iowa the result must be saturated with the inequalities and inaccuracies inevitably attending the fallibility of human judgment applied to such a complex situation. To correct such inequalities and inaccuracies is not the function of courts. First, for the legal reason that the determination of such matters is a legislative function; and, second, for the practical reason (as said by Justice Miller in the above case, p. 610), 'as a valuation of property is more or less matter of opinion, we see no reason why the opinion of this court, or of the Circuit Court, should be better, or should be substituted for that of the board, whose opinion the law has declared to be the one to govern in the matter.' But when the assessing body does not exercise its judgment fairly and honestly, an entirely different situation, both legally and practically, exists. The law gives every taxpayer the legal right to the honest, fair judgment of the assessors as to the value of his property for taxation purposes. The method of enforcing this

right is by invalidating the assessment wrongfully made and enjoining its enforcement. This limit of judicial action, in tax assessment matters, to instances where the allegations and the proof show willful, intentional wrong valuation, has been established by many cases in the Supreme Court. Application of the doctrine is well illustrated in *Albuquerque Bank v. Perea*, 147 U. S., 87; *Sunday Lake Iron Co., v. Wakefield*, 247 U. S., 350; *Raymond v. Traction Co.*, 207 U. S., 20, and *Greene v. Ry.*, 244 U. S., 499. In the Albuquerque Bank and Sunday Lake Iron Co. cases, the court refused to interfere. In the Raymond and Greene cases, injunctions issued and were upheld.

"Therefore, the inquiry here is not whether the property of these complainants was overassessed as compared with farm lands but whether the Executive Council intentionally so overassessed such property. The complainants allege that such was the case.

"We start into the proof with the presumption that the council did its duty and made no intentional overassessment. Nor is overassessment necessarily sufficient, standing alone, to prove intentional overassessment. Complainants have the burden of proving both overassessment and an intention to overassess. *Sunday Lake Iron Co. v. Wakefield*, 247 U. S., 350, 353. In the absence of direct evidence, intention may be inferred from surrounding and attendant circumstances. We may examine the action of the council in the light of the facts before it and upon which it must have based its action.

"As to farm land values, we are aided by a stipulation which places the average value in the state at \$125.00. The average assessment, by the local boards, was \$76.00. This was a fraction over 61 per cent of actual value. It seems to be conceded by counsel for the respondents that respondents knew of this underassessment. If not conceded, the proof is ample that they did know it. Therefore, in assessing complainants' property, they were obligated to apply a relatively similar percentage of valuation. Does the evidence convince that they failed to do so and that such failure was intentional?

“In endeavoring to answer this question, it is important to recognize and give weight to the character of the problem before the council. That problem was to ascertain the value of the property in Iowa of two large interstate railway systems. The statutes of Iowa contemplate that the council shall, in such cases, assess the ‘entire railway within the state’ (Sec. 1336, Code). It includes all real estate (Sec. 1334-A and 1336 Code), personalty (Sec. 1336 Code) and intangibles (Sec. 1336 and 1334 and 1340-A Code). It is contended by complainants that intangible property is not included but we think the above sections are intended to cover such property and the valuation is to be upon the entire property as a going concern. The difficulties of ascertaining the value of a single, simple thing as a house, a building or a tract of land are evident and have been experienced by every court. How infinitely much more complicated and difficult must always be the valuation of a large railway property! For a half century the courts have struggled with this problem and have not yet settled even the bases to be used in determining such value. There have been innumerable cases before the Supreme Court involving the valuation of large public utilities for taxation and rate purposes. In no one of them has it been laid down that any particular basis or method of ascertaining such value was exclusive or controlling. The most that has been decided is that certain bases or methods bore directly upon value and were useful in determining it. Such recognized bases are cost price, reconstruction cost price, market value of stocks and bonds and capitalization of net income. The uncertainties concerning selection of any one basis, or combination of bases, as a standard of value is also made evident by the sharp conflict between economists, accountants and students of this subject. They never have agreed and they do not now agree. This uncertainty is further emphasized in these cases where counsel for the Rock Island present six bases (par value of stocks and bonds, market value of stocks and bonds, capitalization of net income at 6 per cent, capitalization of net income at 7 per cent,

capitalization of government rental at 6 per cent and property investment as shown in Ex Parte No. 74, a valuation proceeding by the Interstate Commerce Commission), the Great Western presents five (physical value, capitalization of net earnings in Iowa at 5 per cent, market value of stocks and bonds, capitalization of net earnings allocated to Iowa at 5 per cent, government rental capitalized at 5 per cent) and respondents present three (investment cost, reproduction cost and valuation under Ex Parte No. 74).

"The difficulty does not stop with the bases of value. It continues into the bases of allocation to Iowa of a proper proportion of the non-fixed property and intangibles. There are, at least, twelve different bases suggested in these cases. As to the Great Western, the six bases suggested by it do not widely vary, the extreme percentages to Iowa being 49.97 per cent and 54.55 per cent. As to the Rock Island, the variation is from 7.25 per cent to 29.63 per cent. As to the Rock Island the respondents contend for a ratio to Iowa of 27.4 per cent.

"All of these theories as to bases of values and bases of allocation were before the council. We are not informed as to which of these theories or combinations of theories the council adopted or what weight it gave to any one or more. All of these bases have some logical bearing upon the matter. As no one has been settled upon, in the decisions, as controlling, the propriety of selection remains a matter of fact (*Grosbeck v. Ry.*, 250 U. S. 607, 615) to be determined by the council, which is the body required by law to make the assessment. In the absence of evidence as to the bases employed, we cannot impugn the good faith of the council if the result reached by it is substantially justified by the application of any one, or combination, of these bases to the facts before it. Nor, direct evidence of intent being present can we impute bad intention if (aside from all theories of valuation and allocation) the council had before it direct evidence of value which rational men would use and which could justify the result reached.

“There remains the test of the intent of the council in the light of the above considerations and of the facts before it. We were told at argument that the council had before it all of the facts here presented. In considering the facts, the evidence is different as between the two complainants and each must, therefore, be considered separately.

THE ROCK ISLAND

“The affidavit of I. A. Hermany (Complainant's Ex. 11) purports to show the value of the entire system on the six bases of par value of stocks and bonds, market value of stocks and bonds, capitalization of net income at 6 per cent, capitalization of net income at 7 per cent, capitalization of government rental at 6 per cent, and value under Ex Parte No. 74. These bases are averaged over a period of five years ending June 30, 1922. Allocation to Iowa is suggested on six different bases. Using all of these factors and giving equal weight to each, the result is a valuation to Iowa of \$56,953,316.00 as against an assessed value of \$66,950,984.00. The inaccuracy of this result, and, therefore, either of the method or of the figures used is shown by the Rock Island bill which sets out a claimed valuation not in excess of \$40,500.00 per mile in Iowa on a mileage of 2,202.335 miles, or an aggregate Iowa value of \$89,194,567.00. For the moment considering the figures in the exhibit to be true, the council may have taken any single base or any combination thereof which it might deem helpful. It may, also, have used any of the suggested methods of allocation, so long as it included therein the requirements of the Iowa statute that it consider gross earnings and the relative proportion of state and interstate ‘business.’ However, this affidavit contains no information as to gross earnings. It is, also, for the fiscal instead of the calendar year, which latter is the taxation period. The council might, also, properly have rejected the five year period and taken the single year 1921 or a shorter period than five years. The result possible for Iowa value by employment of the exhibit figures and some

one or more of these bases of valuation and allocation might range from more than \$109,000,000.00 to a little less than \$10,000,000.00. If the higher results were accepted by the council, the ratio of assessed value would be slightly over 60 per cent as against 61 plus per cent for farm lands.

"There was, however, before the council additional direct evidence of value which might rationally have been considered by it. In fact, the motives of the council could not be successfully attacked had they, in good faith, used that evidence as the basis of the valuation instead of going into the field of suggested theoretical bases of value and methods of allocation. This evidence included the report of the company to the Interstate Commerce Commission of the investment value of its property in Iowa for purposes of physical valuation by the commission; the protest filed by the company to the tentative valuation findings of the Interstate Commerce Commission; and the report of the directors of that railroad to its stockholders. The above report to the commission shows a total valuation of over \$137,500,000. It seems doubtful whether the item therein of 'General Expenditures,' totalling over \$14,300,000.00 should be considered at all for taxation purposes. Excluding this item, however, leaves a balance of over \$123,000,000.00. If this balance be taken as the actual value then the assessment for taxation sinks to slightly over 50 per cent as compared with 61 plus per cent for farm lands.

"The above protest filed by the company with the Interstate Commerce Commission claimed a system value of not less than \$525,000,000.00. From this amount a most liberal deduction for included items not properly to be considered in tax values within the state of Iowa would leave a figure which, allocated by any reasonable method suggested, would apportion to Iowa at least \$100,000,000.00. The assessed value would be 66 per cent thereon as compared with 61 per cent for farm lands. Such narrow difference of percentage might well honestly occur and is slight evidence of fraud.

"In the above annual report to the stockholders

for 1921, the statement is made, and supported by figures, that the physical property of the company, as a going concern, exceeds the par value of the outstanding stocks and bonds. This par value is given, in that report, as slightly over \$362,000,000.00. If that be allocated on the mileage basis for 1921 of 29.81 per cent (being one of the methods suggested by this complainant) the Iowa value is something over \$107,000,000.00. To this the assessed value is 61 per cent plus as against 61 per cent plus for farm lands.

"In view of the above possible findings, based on evidence before it, we cannot say that the council intentionally overassessed this property.

THE GREAT WESTERN

"We apply the same reasoning and examination, as above, to the evidence concerning this carrier. On the basis of physical values, as tentatively determined by the Interstate Commerce Commission, the assessed value is 66 per cent plus if the figures of the carrier be correct or 54 per cent plus if the figures of the respondents are right. Using the reports of the Iowa Railroad Commission and the Executive Council for 1921, the system value is at least \$120,000,000.00. The parties agree that approximately 50 per cent is a fair basis for allocation. Such would give \$60,000,000.00 for Iowa value. The assessed value is less than 40 per cent thereof. Using this same method as to the value found in Ex Parte No. 74, the result is slightly above 40 per cent.

"We conclude, therefore, that the council cannot, on evidence which includes the above, be found to have intentionally overvalued the property of this complainant.

"In the above valuation of the two roads, no account has been taken of intangible values. We have thought it unnecessary to investigate the amount of such values because the showing as to physical values is, in our judgment, sufficient to defeat these ap-

plications for temporary injunctions. We do not say the above methods are, in our opinion, the best to use in ascertaining the values sought but we do think that men honestly seeking such values might rationally use the above methods and figures as a basis.

“Some of these figures have been attacked by the carriers as to some items included therein. It was within the province of the council to reject these contentions and we are not here to review such action as to facts before them. In most instances, an approval of such contentions would not vary the above percentages sufficiently to cast a shadow upon the good faith of the council.

“Our conclusion is, therefore, that the applications should be and they will be denied.”

BRIEF

DIVISION I

A

Section 2 of Article VIII of the Constitution of Iowa does not prohibit the legislature from enacting laws for the taxation of the property of corporations or individuals by classes. The rule is that all corporations and natural persons engaged in the same business must be taxed alike but that different classes of property need not be so taxed.

Michigan Central Railroad Co. v. Powers, 201 U. S. 245, 293, 302;

Hunter v. Colfax Cons. Coal Company, 175 Iowa, 254, 287, 289; 154 N. W. 1037; (Amended) 157 N. W. 145;

Waterloo Rapid Transit Co. v. Bd. of Supervisors, 131 Iowa, 237; 108 N. W. 307;

The Scottish U. & N. Insurance Co. v. Herriott, 109 Iowa, 606; 80 N. W. 665;

Cooley on Taxation, Third Edition, Volume 1, page 291, 365;

In Re Railroad Tax Cases, 92 U. S. 575;
In Re Railroad Tax Cases, 115 U. S. 321;
Columbus & S. R. Co. v. Wright, 151 U. S. 470;
Gray's "Limitations of Taxing Power," Page 647.

B

Section 6 of Article I of the Constitution of Iowa does not prohibit the legislature from enacting laws which operate uniformly upon the individuals of a class to which such laws apply. If, in operation, such laws apply to all persons or citizens in like situation, and within the same class, then there is no offense against the provisions of this section.

Jones v. G. & C. U. Railroad Co., 16 Iowa, 6;
Welch v. C. B. & Q. Railroad Co., 53 Iowa, 632; 6 N. W. 13;
Hawkeye Insurance Co. v. French, 109 Iowa, 585; 80 N. W. 660;
The Scottish U. & N. Ins. Co. v. Herriott, 109 Iowa, 606; 80 N. W. 665.

C

Section 6 of Article I of the Constitution of Iowa does not prohibit the enactment of statutes providing for the uniform assessment and taxation of property by classes.

United Express Co. v. Ellyson, 28 Iowa, 370;
Warren v. Henly, 31 Iowa, 31;
Dubuque v. Railroad Co., 47 Iowa, 196;
Dunleith v. Dubuque, 32 Iowa, 427;
Hawkeye Insurance Co. v. French, 109 Iowa, 585; 80 N. W. 660;
The Scottish U. & N. Ins. Co. v. Herriott, 109 Iowa, 606; 80 N. W. 665;
Des Moines v. Bolton, 128 Iowa, 108; 102 N. W. 1045;
State v. Fairmont Creamery Co. of Neb., 153 Iowa, 702; 133 N. W. 895;

Waterloo Rapid Transit Co. v. Board of Supervisors, 131 Iowa, 237; 108 N. W. 307.

D

The legislature is not bound by the provisions of Section 2, Article VIII of the Constitution of Iowa to assess or tax the properties of corporations in one class upon the same basis as the property of individuals or corporations in other classes.

Davenport v. Railroad Co., 38 Iowa, 633;
Dubuque v. Railroad Co., 47 Iowa, 196;
Central Iowa R. R. Co. v. The Board, 67 Iowa, 199;
25 N. W. 128;

Davenport v. Railroad Co., 16 Iowa, 348;
Railroad Co. v. Dubuque, 17 Iowa, 120;
United Express Co. v. Ellyson, 28 Iowa, 370;
Hunter v. Colfax Cons. Coal Co., 175 Iowa, 245;
154 N. W. 1037; (Amended) 157 N. W. 145;
Iowa Mutual Tornado Insurance Ass'n v. Gilbertson, 129 Iowa, 658; 106 N. W. 153.

E

A like construction has been placed upon the equal protection clause of the 14th Amendment to the Constitution of the United States.

Pacific Express Co. v. Seibert, 142 U. S. 339; 349;
Railroad Co. v. Pennsylvania, 134 U. S. 232;
Gray's "Limitations of Taxing Power," Page 647.

DIVISION II

A

The assessment of taxes is essentially a legislative function.

State R. R. Tax Cases, 92 U. S., 575, 615.

B

Farm lands and railway properties under the statutes of Iowa are placed in separate and distinct classes for taxation purposes.

Section 1305, Code Supplement 1913;
Sections 1334, 1334-a, 1334-b, Supplement to the Code 1913;
Sections 1335 and 1336, Code 1897 and succeeding sections.

The provisions of Section 1305 of the Code Supplement 1913 apply only in the absence of a specific statute providing another and different method of valuation.

C

The legislature has provided many different methods of fixing the assessment value or base of property.

Section 1310, Code Supplement 1913;
Section 1314, Code 1897;
Section 1315, Code 1897;
Section 1318, Code 1897;
Section 1319, Code 1897;
Section 1321, Code Supplement 1913;
Section 1322, Code Supplement 1913;
Section 1323, Code 1897;
Sections 1330, 1330-a, Code Supplement 1913;
Section 1333, Code Supplement 1913;
Section 1333-a, Code Supplement 1913;
Section 1336, Code 1897;
Section 1340, Code 1897;
Section 1342-a, Code Supplement 1913;
Section 1343, Code 1897;
Sections 1346-d, 1346-e, Code Supplement 1913;
Section 1347-a, Code Supplement 1913;
Section 1350, Code 1897.

D

Railway properties are valued for taxation purposes under special provisions of the statutes.

Sections 1334, 1334-a, 1334-b, 1334-c, 1337, 1337-a, 1340, 1340-a, 1340-b, 1340-c, 1340-d, 1340-e, 1340-f, Code Supplement 1913 and Sections 1335, 1336, 1338, 1339, 1341 and 1342 of the Code 1897.

E

The executive council is clothed with full power and authority to find and to determine the assessment base or value of railway properties.

Section 1334, Code Supplement 1913, *et seq.*

F

Farm lands are assessed only in odd-numbered years, therefore, the executive council had nothing to do with the assessment of farm lands in the year 1922.

Section 1350, Code 1897.

G

The Executive Council of Iowa, sitting as a State Board of Equalization, has no power to generally increase the assessments of land in all of the counties. Its sole duty is to equalize among the several counties.

Pierce v. Executive Council, 165 Iowa, 465, 471;
Montis v. McQuiston, 107 Iowa, 651.

DIVISION III

A

Courts will not assume jurisdiction nor interfere with an assessment made by an assessing board, unless it ap-

pears that said board discriminated against a certain class of property by intentionally, knowingly and systematically assessing it at a higher percentage of actual value than it intentionally assessed other classes of property. Even then the courts merely reduce the assessed value of such overassessed property to the same relative basis at which other property was assessed.

Sioux City Bridge Co. v. Dakota Co., 67 L. Ed. 340, 343;

Greene v. L. & N. R. R. Co., 244 U. S. 499;

Taylor v. L. & N. R. R. Co., 88 Fed. 350;

Albuquerque Bank v. Perca, 147 U. S. 87;

Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350;

Raymond v. Traction Co., 207 U. S. 20.

B

In a suit to restrain and to enjoin an assessment, it is not sufficient to prove the undervaluation of other classes of property or of other property within the same class. Such undervaluation must be intentional, continuous and habitual.

C. G. W. Railway Co. v. N. E. Kendall, opinion of the Three-Judge Court on file herein;

Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350;

Southern R. R. Co. v. Watts, 67 L. Ed. 375; 260 U. S. 519;

C. B. & Q. Ry. Co. v. Babcock, 204 U. S. 585;

Coulter v. L. & N. R. R. Co., 196 U. S. 599;

Sioux City Bridge Co. v. Dakota County, 43 Sup. Ct. Rep. (U. S.) 190; 67 L. Ed. 340, 343.

C

The burden of proving both overassessment and an intention to overassess is on the appellant.

Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350; 353;

- McDermott v. Mahoney*, 119 Iowa, 470; 93 N. W. 499;
Brackett v. Commonwealth, 111 N. E. 1036 (Mass.).
Bituminized Brick & Tile Co. v. Simons Brick Co., 192 Pac. 528 (Cal.).

D

Mere errors of judgment do not support a claim of discrimination, but that there must be something more—something which, in effect, amounts to an intentional violation of the essential principle of practical uniformity.

- Sioux City Bridge Co. v. Dakota County*, 67 L. Ed. 340, 343;
Southern Ry. Co. v. Watts, 260 U. S. 519;
Sunday Lake Iron Co. v. Wakefield Twp., 247 U. S. 350, 353, 62 L. Ed. 1154, 1156, 38 Sup. Ct. Rep. 495;
State R. R. Tax Cases, 92 U. S. 575, 612.

E

It is fundamental that the construction placed upon the constitution of a state by the court of last resort of the state is binding upon the federal courts.

- In Re Gilligan*, 206 U. S. 563;
Corington v. First Natl. Bank, 198 U. S. 100; 40 L. R. A. (N. S.) 447 (Note).

F

Letters may constitute written admissions and in order to render them admissible in evidence it is not necessary that they shall have been sent to the party offering them.

- Castner v. C. B. & Q. R. Co.*, 126 Iowa, 581; 102 N. W. 499;
Nichols Shepard Co. v. Ringler, 135 Iowa, 181; 112 N. W. 543;

- Steele Smith Groc. Co. v. Potthast*, 109 Iowa, 413;
80 N. W. 517;
Auto & Supply Co. v. Jeffrey & Co., 139 Iowa, 7, 10;
La Abra Silver Mining Co. v. United States, 175
U. S. 423, 498;
Xenia First National Bank v. Stewart, 114 U. S.
224, 228.

G

Reports made by a railroad corporation under the provisions of a statute to the Board of Railroad Commissioners of Iowa, are admissible in evidence as public records and as admissions in any case where their contents are material. The statute does not specify or limit the uses to which they may be put.

- Section 2143, Code 1897;
Brackett v. Commonwealth, 111 N. E. 1036
(Mass.).

H

Reports to the Interstate Commerce Commission by a railroad corporation are public records and are admissible in evidence in all judicial proceedings.

- Section 16, Interstate Commerce Act, as amended;
Paragraph 12, Sec. 8584, United States Compiled
Statutes 1916;
Hanish v. United States, 227 Fed. 584, 585 (Ill.),
Sanborn, J.

I

The annual reports and books of a corporation are admissible in evidence against it as admissions.

- Smith v. Martin*, 106 Atl. 666 (Vt.);
Bailey v. Railroad Co., 89 U. S. 604;
Vicksburg, etc., R. Co. v. Putnam, 118 U. S. 545;
N. Am. Bldg. Ass'n v. Sutton, 35 Pa. St. 463;

Foster v. White Cloud City Co., 32 Mo. 505;
La Abra Silver Mining Co. v. U. S., 175 U. S. 423,
498.

J

Pleadings filed in another case containing admissions, are competent evidence against the party making them in another suit as admissions of the facts stated.

Pope v. Allis, 115 U. S. at p. 370;
Gen'l Electric Co. v. Clark & Sons Co., 108 Fed. 170.

K

A written statement is none the less competent as an admission because it is contained in a document which is not itself effective for the purpose for which it was made.

Snyder v. Reno, 38 Iowa, 329;
Turrentine v. Grigsby, 118 Ala. 380; 23 So. 666.

L

Where two writings are clearly connected the admission of one renders the other competent.

Section 4615, Code 1897;
Seever v. Cleveland Coal Co., 158 Iowa, 574; 138
N. W. 793;
Jones v. Hopkins, 32 Iowa, 503;
Williams v. Donaldson, 8 Iowa, 108;
Veiths v. Hagge 8 Iowa, 163, 189;
Walkley v. Clarke, 107 Iowa, 451;
Hutton v. Doersee, 116 Iowa, 13.

DIVISION VI

A

In the absence of specific direction in the statutes, the selection of the method of determining the assessed value is a matter of fact to be determined by the assessing body.

Groesbeck v. Ry., 250 U. S. 607, 615.

B

For taxation purposes the minimum value is the value of the physical property.

Baker v. Druesdow, 68 L. Ed. Advance Op. 53;

Railroad Tax Cases, 92 U. S. 575;

Ohio Tax Cases, 232 U. S. 590;

Westshore Ry. Co. v. State Bd. of Assessors, 82 N. J. L. 41; 81 Atl. 352;

Morrison v. Manchester, 58 N. H. 551;

Boston R. R. Co. v. State, 62 N. H. 649;

C. N. W. Ry. Co. v. Eveland, 285 Fed. 425;

Branson v. Bush, 251 U. S. 182;

Per Curiam Opinion on Temporary Hearing
Herein.

C

The method most frequently used by courts and commissions to determine the present physical or structural value of a railroad or public utility property is the cost of reproduction method.

Mo. Ex Rel. S. W. Bell Tel. Co. v. Pub. Serr. Com.,
67 L. Ed. 981; 262 U. S. 276;

Bluefield Water Works Co. v. Pub. Service Com.,
261 U. S. 679;

Southern Ry. Co. v. Watts, 260 U. S. 519;

Des Moines Gas Co. v. Des Moines, 238 U. S. 153;

Kansas City Southern R. R. Co. v. United States,
231 U. S. 423, 445;

- Minnesota Rate Cases*, 230 U. S. 352, 434, 453, 454, 458;
Willcox v. Consolidated Gas Co., 212 U. S. 19, 41, 52;
Stanislaus Co. v. San Joaquin, 192 U. S. 201;
San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 442;
Cotling v. Kansas City Stock Yards Co., 183 U. S. 79, 91;
San Diego Land & Town Co. v. National City, 174 U. S. 739;
Smith v. Ames, 169 U. S. 466;
Ames v. Union Pac. R. R. Co., 64 Fed. 165;
Des Moines Gas Co. v. Des Moines, 199 Fed. 204.

D

The distinction between value for rate-making purposes and value for taxation purposes is that in taxation matters other elements of value are to be added, which cannot be included in rate-making values. The elements of value common to both, have the same value regardless of the purpose of the valuation.

- Harvard Law Review for May, 1920, p. 902;
Omaha v. Omaha Water Co., 218 U. S. 180, 202, 203;
Nat'l Waterworks v. Kansas City, 62 Fed. 853, 865;
Ames v. Union Pacific Railway Co., 64 Fed. 165, 176;
San Diego Land & Town Co. v. National City, 74 Fed. 79, 83, 84; 174 U. S. 739, 757, 758;
San Diego Co. v. Jasper, 189 U. S. 439;
Stanislaus County v. San Joaquin, 192 U. S. 201.

E

It is proper to allocate value to the state of Iowa on the milenge prorata basis in the absence of a clear showing that such method works an injustice or is grossly unfair, either to the state or the complainant.

- L. & N. R. R. Co. v. Green*, 244 U. S. 522, 548;
State R. R. Tax Cases, 92 U. S. 575, 608, 611;
Pullman Palace Car Co. v. Penn., 141 U. S. 18, 26;
Pittsburgh, etc., R. R. Co. v. Backus, 154 U. S. 421,
430, 431, 444;
Western Union Telegraph Co. v. Taggart, 163 U. S.
1, 26, 27;
Fargo v. Hart, 193 U. S. 490, 499;
Columbus So. R. R. Co. v. Wright, 151 U. S. 470,
479, 480;
Western Union Telegraph Co. v. Gottlieb, 190 U.
S. 412;
Western Union Telegraph Co. v. Mass., 125 U. S.
530;
Postal Telegraph Co. v. Adams, 155 U. S. 688;
Adams Express Co. v. Ohio State Auditor, 165
U. S. 194;
Branson v. Bush, 251 U. S. 182;
Westshore R. R. Co. v. State Bd. of Assessors, 82
N. J. L. 38; 81 Atl. 352.

F

The branch or feeder lines of a railroad must be considered as a part of the system, and the net earnings allocated to such lines on the mileage prorate basis is unfair.

- R. & S. Ass'n v. Ry. Co.*, 18 I. C. C. 440, 485;
N. J. Jct. R. R. Co. v. Assessors, 84 N. J. L. 413;
Union Pac. R. Co. v. Christensen, 275 Fed. 6;
Atl. & S. L. R. R. Co. v. State, 60 N. H. 133;
Louisville & N. R. Co. v. Bosworth, 209 Fed. 380;
Branson v. Bush, 251 U. S. 181, 187.

DIVISION VII

A

The co-ordinating of the "bare-bones" of a railroad property into an efficient working organism, and the development of such a plant into an established going busi-

ness, adds to the value of the bare physical property an additional value due to the existence of these elements known as "going concern value."

- Omaha v. Omaha Water Company*, 218 U. S. 180;
Cedar Rapids Gas Light Co. v. Cedar Rapids, 144
Iowa 426; 223 U. S. 665, 670;
Des Moines Gas Co. v. Des Moines, 238 U. S. 153,
165;
Denver v. Denver Union Water Company, 246 U. S.
178, 192;
Knorrville v. Knorrville Water Co., 212 U. S. 1;
Willcox v. Consolidated Gas Co., 212 U. S. 19.

B

"Franchise Value" is that element of value inherent in a railroad property represented by franchises and privileges, and is included in a value for taxation or exchange purposes.

- N. W. R. R. Co. v. Excland*, 285 Fed. 425, 435;
Opinion filed herein denying application for temporary injunction;
State Railroad Tax Cases, 92 U. S. 575, 606;
Ohio Tax Cases, 232 U. S. 590;
Willcox v. Consolidated Gas Company, 212 U. S.
19;
Monongahela Navigation Co. v. U. S., 148 U. S. 312.

C

Earning capacity is an element of value inherent in a railroad property, and is due to its favorable location with reference to command of traffic-producing industries along its line, its advantage of connections, potential traffic in its tributary territory and location features, present and prospective.

- Monongahela Navigation Company v. U. S.*, 148
U. S. 312 (Condemnation Case);

Cleveland, Cinn., Chicago & St. Louis Railway Co. v. Backus, 154 U. S. 439, 445 (Tax Case);
Franklin County v. M. C. & T. L. Ry. Co., 12 Lea 521 (Tax Case);
Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 166 U. S. 185 (Tax Case);
Smyth v. Ames, 169 U. S. 466, 546.

D

“Good Will” is recognized as an element of value inherent in a railroad property and is to be included in arriving at the total value of a railroad property for taxation purposes.

Metropolitan Trust Co. v. Houston & T. C. R. Co., 90 Fed. 683;
Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655;
Consolidated Gas Case, 212 U. S. 19, 52;
Omaha v. Omaha Water Co., 218 U. S. 180;
“Jurisdiction to Tax,” by Prof. Beale, Harvard Law Review for April, 1919, page 614.

E

Railroad property situated partly within and partly without the state but organically related, may be taken into consideration as a means of reaching the full value of the property in the state.

L. & N. R. R. Co. v. Green, 244 U. S. 522, 548;
State R. R. Tax Cases, 92 U. S. 575, 608, 611;
Pullman Palace Car Co. v. Penn., 141 U. S. 18, 26;
Pittsburgh, etc., R. R. Co. v. Backus, 154 U. S. 421, 430, 431, 444;
Western Union Telegraph Co. v. Taggart, 163 U. S. 1, 26, 27;
Fargo v. Hart, 193 U. S. 490, 499;
Adams Express Co. v. Ohio State Auditor, 165 U. S. 194;
Union Tank Line Company v. Wright, 249 U. S. 275.

DIVISION VIII

A

The market value of the stocks and bonds of a railroad company should be given little or no weight in the determination of total value for taxation purposes.

People v. Commissioners of Taxes and Assessments, 23 N. Y. 192;

People v. Coleman, 126 N. Y. 448; 27 N. E. 818, 12 L. R. A. 762;

People v. Feitner, 77 N. Y. S. 745;

M. W. & S. R. Co. v. Morley, 198 Fed. 991.

B

The capitalization of net earnings should not be given controlling weight in arriving at a total value for taxation purposes in Iowa.

Iowa Statutes;

Pittsburgh Railway Co. v. Backus, 154 U. S. 439;

Adams Express Co. v. Ohio, 166 U. S. 185;

Kennebec Water Company v. Waterville, 97 Maine 185; 60 L. R. A. 856; 54 Atl. 6;

Minnesota Rate Cases, 230 U. S. 352;

Smyth v. Ames, 169 U. S. 466;

Re Passenger Rates, M. St. P. v. S. S. M. R. Co., 1 Wis., R. C. R. 540 (1907);

Illinois Central, etc., R. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 462;

Kansas City Southern Ry. v. U. S., 231 U. S. 423, 446, 447;

Louisiana Railway Commission v. Cumberland Telephone Company, 212 U. S. 414.

ARGUMENT

I

There is but one issue in this case, namely, did the Executive Council of Iowa, in fixing the assessment of

the appellant's property in the year 1922, knowingly, intentionally and as a part of a general scheme, assess the appellant's property upon a basis of 75 per cent of actual value, at the same time knowing that farm lands had been knowingly, intentionally and as a part of a general scheme assessed upon a basis of only 38 per cent of actual value. No claim to the adoption of a wrong method of fixing value or to a misinterpretation of the law is advanced.

As the base upon which to found its case the appellant in its bill first contends that the Constitution of the State of Iowa prohibits the classification of property for taxation purposes. The constitutional provisions referred to are as follows:

"The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals."—Section 2, Article VIII, Constitution of Iowa.

"All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of citizens, privileges or immunities, which upon the same terms shall not equally apply to all citizens."—Section 6, Article I, Constitution of Iowa.

It is fundamental that the construction placed upon the constitution of a state by the court of last resort of the state is binding upon the federal courts. *In Re Gilligan*, 206 U. S. 563; *Covington v. First National Bank*, 198 U. S. 100; 40 L. R. A. (N. S.) 447 (Note).

It is likewise fundamental that unless there is something in the state constitution which requires the assessment of all property upon the same basis, the legislature may provide for the assessment of property by classes. Mr. James M. Gray in his work "Limitations of Taxing

Power," at page 647, after discussing this question at length, says:

"The effect is that the only real effective protection against inequality of taxation which is available to the taxpayer is such protection as is afforded by the constitutions of the states."

The Supreme Court of Iowa has construed both these provisions of the Iowa Constitution. Section 2 of Article VIII has been construed as permitting the legislature to classify property, both of corporations and natural persons for assessment and taxation. It has been held that this provision was designed to prevent the exemption of corporate property from taxation. *Insurance Company v. Herriott*, 109 Iowa 606; *Association v. Gilbertson*, 129 Iowa 658; *Railroad Company v. The Board*, 67 Iowa 199; *Davenport v. Railroad Co.*, 38 Iowa 635; *Dubuque v. Railroad Co.*, 39 Iowa 56; *Hunter v. Coal Co.*, 175 Iowa 245; *Waterloo Rapid Transit Co. v. The Board*, 131 Iowa 237.

The interpretation placed upon Section 6 of Article I of the Constitution of Iowa is to the same effect, the court holding that the only requirement is that all property within the same class, whether the property of an individual or a corporation shall be assessed alike, but that property in different classes may be assessed upon a different basis. *United Express Co. v. Ellyson*, 28 Iowa 370; *Warren v. Henly*, 31 Iowa 31; *Scottish Ins. Co. v. Herriott*, 109 Iowa 606; *Des Moines v. Bolton*, 128 Iowa 108; *Hubbell v. Higgins*, 148 Iowa 36; *Waterloo Rapid Transit Co. v. Supervisors*, 131 Iowa 237; *Dubuque v. C. R. I. & P. R. R. Co.*, 47 Iowa 196; *Dunleith v. Dubuque*, 32 Iowa 427; *Hawkeye Ins. Co. v. French*, 109 Iowa 585.

The court of last resort of Iowa has also held that the

statutes of Iowa providing for the taxation of railway properties do not violate the provisions of either Section 6 of Article I or Section 2 of Article VIII, or Section 30 of Article III of the Iowa Constitution. *Dubuque v. Railway Co.*, 47 Iowa 196; *Central Ia. Railway v. The Board*, 67 Iowa 199; *United Express Co. v. Ellyson*, 28 Iowa 370; *Warren v. Henly*, 31 Iowa 31.

The marked distinction between the case at bar and other cases in which the federal court has assumed jurisdiction will be apparent from a study of such cases. In the several cases relied upon by the appellant the state constitution contains a provision requiring uniformity of taxation, not only within the class but as between classes. For example, in the case most stressed, *Greene v. Louisville, Etc., Ry. Co.*, 244 U. S. 499, jurisdiction was expressly entertained upon the ground that the rule of equality and uniformity guaranteed by the Kentucky Constitution confessedly violated by the state taxing board of that state brought the case within the equal protection clause of the Fourteenth Amendment of the Federal Constitution, thereby creating a federal question, opening the door for the exercise of federal jurisdiction.

Section 174 of the Kentucky Constitution provides as follows:

Section 174. "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this constitution, and all corporate property shall be the same rate of taxation paid by individual property."

Such also was the precise situation in *Raymond v. Traction Co.*, 207 U. S. 20, in which the Illinois Constitution provided:

"The general assembly shall provide such revenue as may be needful by levying a tax by valuation, so

that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct and not otherwise."

Having determined then that there is nothing in the state constitution which will confer jurisdiction upon the court, may we now turn to a consideration of the statutory law of the state.

II

THE IOWA STATUTES

It was contended by the appellant that both classes of property, namely, farm lands and railway properties, are to be valued for assessment purposes under the provisions of section 1305 of the supplement to the code 1913. It is true that there is a general provision relating to the fixing of the assessment base or value of property. This section 1305 of the code supplement 1913, is in words as follows:

"All property subject to taxation shall be valued at its actual value, and shall be assessed at twenty-five per cent of such actual value. Such assessed value shall be taken and considered as the taxable value of such property, upon which the levy shall be made. Actual value of property as used in this chapter shall mean its value in the market in the ordinary course of trade. This section shall not apply to special charter cities."

This general law, however, applies in the absence of a specific statute, only. A consideration of the laws of the state relating to the assessment of property will clearly show that the legislature has, as to many classes of property, provided specific assessment bases or values to be arrived at in a different manner than is provided in the

general statute. In this connection, attention is invited to a consideration of the assessment laws relating to the property of merchants, the property of manufacturers, the property of banks, moneys and credits, the property of express companies, the property of general corporations, the property of freight line companies, the property of transmission line companies, the property of telephone companies, the property of gas and water works, the property of building and loan associations, the property of insurance companies, and particularly the property of railway companies. These statutes have been uniformly upheld by the court of last resort of the state.

Railway properties under the law are valued for assessment purposes under the provisions of section 1336 of the code 1897. This section is in words as follows:

“The said property shall be valued at its actual value, and the assessments shall be made upon the taxable value of the entire railway within the state, except as otherwise provided, and shall include the right of way, roadbed, bridges, culverts, rolling stock, depots, station grounds, shops, buildings, gravel beds and all other property, real and personal, exclusively used in the operation of such railway. In assessing said railway and its equipments, said council shall take into consideration the gross earnings per mile for the year ending January first, preceeding, and any and all other matters necessary to enable said council to make a just and equitable assessment of said railway property. If a part of any railway is without this state, then, in estimating the value of its rolling stock, and movable property, they shall take into consideration the proportion which the business of that part of the railway lying within the state bears to the business of the railway without this state.”

We call attention to the fact that under the law farm lands are originally assessed by local assessors in the sev-

eral taxing districts of the state. The assessor fixes the value of such properties as directed by the terms and provisions of section 1305 of the code supplement 1913. He then submits his findings to the local board of review of the taxing district and such local board of review proceeds to hear complaints, either on the part of the property owner or on the part of the public, all to the end that the acts of the assessor may be carefully reviewed and as nearly as possible, a correct result attained. After the action of the local board of review, the results are submitted to the county board of supervisors, which sits as a board of equalization for the purpose of adjusting and equalizing as between the several taxing districts of the county. After the board of equalization of the county has acted, the results are transmitted to the state auditor and by him laid before the executive council, sitting as a board of equalization. The executive council proceeds to equalize as between the counties, all to the end that there may be, as nearly as possible, uniformity as between the counties.

At this point, may we call attention to the fact that the assessment of farm lands is made only in odd-numbered years. Section 1350 of the code 1897 provides as follows:

“Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. Real estate shall be listed and valued in each odd-numbered year, and in each year in which real estate is not regularly assessed the assessor shall list and assess any real property not included in the previous assessment, and also any building erected since the previous assessment, with a minute of the tract or lot of land whereon the same are situated, and the auditor shall thereupon enter the taxable value of such buildings on the tax list as a part of the real estate to be taxed; but if such buildings are

erected by another than the owner of the real estate, they shall be listed and assessed to the owner as personal property."

Therefore, in even-numbered years no change can be made by any assessorial body of the state as to the assessment of farm lands. It is true that provision is made for the addition of the improvements which have been added to the lands during the year, but the original land itself is assessed in odd-numbered years only. We are constrained to request the court to keep this fact in mind as it will be referred to later in this brief and argument.

On the other hand, railway properties are assessed each year by the Executive Council of the state. Such properties are assessed as a whole and not by parts. The value so arrived at is divided among the several taxing districts of the state in proportion as the mileage within such taxing district is to the mileage within the state. Many elements of value are to be considered by the Executive Council in fixing the value of railway properties, whereas, as to farm lands, only the value in the market in the ordinary course of trade is to be considered.

Having observed that railway properties are to be valued for assessment purposes under the provisions of the special statutes relating thereto, may we now give consideration to the requirements of such statutes.

For convenience we quote these statutes at length. They are in words and figures as follows:

Sec. 1334, Code Supplement 1913. "Railway Companies—when made—verified statement—when furnished. On the second Monday in July in each year, the executive council shall assess all the property of each railway corporation in the state, excepting the lands, lots and other real estate belonging thereto not used in the operation of any railway, and excepting railway bridges across the Mississippi and Mis-

souri Rivers, and excepting grain elevators; and for the purpose of making such assessment its president, vice president, general manager, general superintendent, receiver or such other officer as the council may designate, shall on or before the first day of April in each year, furnish it a verified statement, showing in detail, for the year ended December 31st next preceeding:

"1. The whole number of miles of railway owned, operated or leased by such corporation or company within and without the state;

"2. The whole number of miles of railway owned, operated or leased within the state, including double tracks and side tracks, the mileage of the main line and branch lines to be stated separately, and showing the number of miles of track in each county;

"3. A full and complete statement of the cost and actual present value of all buildings of every description owned by said railway company within the state not otherwise assessed;

"4. The total number of ties per mile used on all its tracks within the state;

"5. The weight of rails per yard in main line, double tracks and side tracks;

"6. The number of miles of telegraph lines owned and used within the state;

"7. The total number of engines, and passenger, chair, dining, official, express, mail, baggage, freight and other cars, including hand cars and boarding cars used in constructing and repairing such railway, in use on its whole line, and the sleeping cars owned by it, and the number of each class on its line within the state, each class to be valued separately;

"8. Any and all other movable property owned by said railway within the state, classified and scheduled in such manner as may be required by said council;

"9. The gross earnings of the entire road, and the gross earnings in this state;

"10. The operating expenses of the entire road, and the operating expenses within this state;

"11. The net earnings of the entire road, and the net earnings, within this state."

Sec. 1334-a, Code Supplement 1913. "Detailed Statements—what to include. Each railway or other corporation required by law to report to the executive council under the provisions of the law as it appears in section thirteen hundred thirty-four of the supplement to the code shall, on or before the first day of April, nineteen hundred and five, make to the executive council a detailed statement showing the amount of real estate owned or used by it on December thirty-first, nineteen hundred and four, for railway purposes, in each county in the state in which said real estate is situated, including the right of way, roadbed, bridges, culverts, depot grounds, station buildings, yards, section and tool houses, round houses, machine and repair shops, water tanks, turntables, gravel beds and stone quarries, and for all other purposes, with the estimated actual value thereof in such manner as may be required by the executive council. Only one such detailed statement by any corporation shall be necessary, and when received by the council it shall become the record of railway lands of such corporation, and redeemed as annually thereafter reported for valuation and assessment by the executive council. On or before the first day of April of each subsequent year such corporation shall in like manner report all the real estate acquired for any of the railway purposes above named during the preceding calendar year; and also a list of any real estate, previously reported, disposed of during the same period, which disposition shall be noted by the council in an appropriate column opposite to the description of said tract in the original report of the same in the record of railway land."

Sec. 1334-b, Code Supplement 1913. "Record of railway lands. The executive council, shall, by some convenient method of binding, arrange the statements required to be made under the provision of the preceding section so as to form a consolidated list of all real estate reported to it as being owned or used for railway purposes within the state of Iowa, which list shall be known as the record of railway lands."

Sec. 1335, Code of Iowa, 1897. "Operating expenses—amended statement. There shall not be included in said operating expenses any payments for interest or discount, or construction of new tracks except needed sidings, for raising or lowering tracks above or below crossings at grade in cities or towns, for new equipment, except replacements, for reducing any bonded or permanent debt, nor for any other item of operating expenses not fairly and reasonably chargeable as such in railway accounts. The council may demand, in writing, detailed, explanatory and amended statements of any of the items mentioned in the preceding section, or any other items deemed by it important, to be furnished it by such railway corporation within thirty days from such demand, in such form as it may designate, which shall be verified as required for the original statement. The returns, both original and amended, shall show such other facts as the council, in writing, shall require."

Sec. 1340, Supplement Code 1913. "Number of sleeping and dining cars. In addition to the matters required to be contained in the statement made by the company for the purposes of taxation, such statement shall show the number of sleeping and dining cars not owned by such corporation, but used by it in operating its railway in the state during each month of the year for which the return is made, the value of each car so used, and also the number of miles each month said cars have been run or operated on such railway, within the state, and the total number of miles said cars have been run or operated each month within and without the state. Such statement shall show the average daily sleeping car and dining car service or wheelage operated on each part or division of the line or system within the state, designating the points on the line where variations occur, with the mileage of that part having the same daily service or wheelage."

Sec. 1340-a, Supplement Code 1913. "Gross earnings—proportion. That for the purpose of making reports to the executive council, the gross earnings of railway companies, owning or operating a line, or lines of railway partly within this state, and partly

within another state, or other states, or territory, or territories, upon their line or lines within this state, shall be ascertained and reported by said railway companies as follows, to-wit: The aggregate of the earnings upon business originating and terminating within this state, upon business originating in this state and terminating elsewhere, upon business originating elsewhere and terminating in this state, and upon business neither originating or terminating in this state but carried on or done over the line or lines in this state or over some part thereof, shall be reported; and with respect to all such interstate business the earnings in this state for the purpose of report shall be actually computed upon the basis of the length of haul or carriage in this state as compared with the length of haul or carriage elsewhere. It being hereby declared that for the purpose of making reports looking to the assessment of railway property for taxation, the gross earnings or business done or carried partly within this state and partly in another state, or other states, or territories, shall be that proportion of the entire earnings of such business that the haul or carriage in this state bears to the entire haul or carriage."

Sec. 1340-c. Supplement to the Code 1913. "Net earnings. The executive council shall have the power to prescribe a method for all railway companies doing business in this state, together with the rules and regulations for the ascertainment of the net earnings of the railway lines in this state, to the end that all such railway companies, in ascertaining and making report of net earnings, shall proceed upon the same basis and in a uniform manner."

Sec. 1340-e. Supplement to the Code, 1913. "Additional rules and regulations. The rules, regulations, method and requirements herein provided to be made by the executive council shall be made and communicated in writing or print to the said several railway companies within thirty days from and after the passage and taking effect of this act, and shall be and become binding upon said railway companies from the time they are so communicated; provided, however, that the said executive council shall have

the power to prescribe supplemental or additional rules, regulations, and requirements at any time, and communicate them to the several railway companies in the manner aforesaid, and with respect to such additional or supplemental rules, regulations, and requirements, they shall be and become binding upon the said railway companies within thirty days after they are so communicated."

Sec. 1340-f, Supplement to the Code, 1913. "Refusal to conform to rules—penalty. If any railway company shall fail or refuse to obey or conform to the rules, regulations, method, and requirements so made or prescribed by the executive council, under the provisions of this act, or to make the reports as herein provided for, the executive council shall proceed and assess the property of such railway company so failing or refusing, according to the best information obtainable, and shall then add to the taxable valuation of such railway company 25 per centum thereof, which valuation and penalty shall be separately shown, and together shall constitute the assessment for that year."

Sec. 1336, Code of Iowa, 1897. "Valuation. The said property shall be valued at its actual value, and the assessments shall be made upon the taxable value of the entire railway within the state, except as otherwise provided, and shall include the right of way, roadbed, bridges, culverts, rolling stock, depots, station grounds, shops, buildings, gravel beds and all other property, real and personal, exclusively used in the operation of such railway. In assessing said railway and its equipments, said council shall take into consideration the gross earnings per mile for the year ending January 1, preceding, and any and all other matters necessary to enable said council to make a just and equitable assessment of said railway property. If a part of any railway is without this state, then, in estimating the value of its rolling stock and movable property, they shall take into consideration the proportion which the business of that part of the railway lying within the state bears to the business of the railway without this state."

Sec. 1341, Code 1897. "Assessment by executive

council. The council shall, at the time of the assessment of other railway property for taxation, assess for taxation the average number of cars so used by such corporation each month, and the assessed value of said cars shall bear the same proportion to the entire value thereof that the monthly average number of miles such cars have been run or operated within the state shall bear to the monthly average number of miles such cars have been used or operated within and without the state. Such valuation shall be in the same ratio as that of the property of individuals, and shall be added to the assessed valuation of the corporation, fixed under the preceding sections."

Sec. 1342, Code 1897. "Real property of railways. Lands, lots, and other real estate belonging to any railway company, not used exclusively in the operation of the several roads, and all railway bridges across the Mississippi and Missouri rivers, and grain elevators, shall be subject to assessment and taxation on the same basis as property of individuals in the several counties where situated."

Sec. 1339, Code 1897. "Rate. All such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purpose as the property of individuals within such counties, cities, towns, townships and lesser taxing districts."

It is fundamental that all statutes relating to the same subject are to be construed together in determining the true intent and purpose of the legislature. Therefore, in determining what was the true intent and purpose of the legislature of Iowa in fixing the assessment base or value of railway properties, all of these statutes must be considered. These statutes provide for the Executive Council to secure a complete and itemized accounting of the physical units of property, both real and personal, used in the operation of the properties of the carrier within the state. This itemized schedule separates the fixed property and the movable property so that the data

will be complete as to both classes of property. This data is secured by the Executive Council for some definite purpose. If the value of the carrier is to be fixed without regard to the separate units of physical property, then there would have been no necessity for the enactment of these several statutes providing for the reporting of the physical units and related facts. Does it not necessarily follow that the true intent and purpose of the legislature was to secure a complete accounting of the physical properties for valuation purposes? This purpose is not only disclosed in the several sections of the statutes quoted but it is particularly emphasized in the valuation section, Sec. 1336, Code 1897, wherein it is provided that the valuation shall include "the right of way, roadbed, bridges, culverts, rolling stock, depots, station grounds, shops, buildings, gravel beds and all other property, real and personal, exclusively used in the operation of such railway." Therefore, we feel justified in saying that no other possible construction can be placed upon these statutes than that:

1st. There must be a valuation of the physical units; and

2d. To the valuation of the physical units must be added the valuation of the intangible elements.

III

IN GENERAL.

It is fundamental that the assessment of property for taxation purposes is a legislative function. Under the Constitution of Iowa the legislature has an absolute right to vest the Executive Council of Iowa with full and complete authority to assess the appellant's property as well as to equalize the value of real estate. The courts will

not interfere to correct mere errors in legislative judgment.

State Railroad Tax Cases, 92 U. S. 575;

Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350;

C. B. & Q. Ry. Co. v. Babcock, 204 U. S. 585.

In order for the court to assume jurisdiction in this case it must be shown clearly and satisfactorily that there has been a departure from the rule of practical uniformity and that such departure has been intentional, systematic and continuous. Chief Justice Taft in *Sioux City Bridge Co. v. Dakota County* (U. S.) 67 L. Ed. 343, well states the rule when he says:

“Mere errors of judgment do not support a claim of discrimination, but there must be something more, something which, in effect, amounts to an intentional violation of the essential principle of practical uniformity. *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 353; 62 L. Ed. 1154, 1156; 38 Sup. Ct. Rep. 495.”

Mr. Justice Miller in *Railroad Tax Cases*, 92 U. S. 575, says:

“Perfect equality and perfect uniformity of taxation as regards individuals or corporations or the different classes of property subject to taxation, is a dream unrealized, * * * as all valuation of property is more or less a matter of opinion we see no reason why the opinion of this court or of the circuit court should be better or should be substituted for that of the board, whose opinion the law had declared to be the one to govern in the matter.”

The Court in *Pittsburgh Ry. Co. v. Backus*, 154 U. S. 421, 434, 435, 436, says:

“Upon this testimony (testimony as to the value of complainant's property) the decision of the court was that there was nothing to impeach the assess-

ment made by the state board, and in this conclusion we concur. The true cash value of the plaintiff's property in the state of Indiana in the year 1891 was a question of fact, the determination of which for the purposes of taxation was given to this special tribunal, the state board. Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts, it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined. Here the question determined by the state board was the value of certain property. That determination cannot be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the board. It is true such testimony may be competent, and was received in this case because, taken in conjunction with other testimony, it might establish fraudulent conduct on the part of the board sufficient to vitiate its determination. It is not, however, contended by counsel that there was any actual fraud on the part of that board; that the individual members thereof deliberately violated the obligations of their oaths of office, and intentionally placed upon the property of the plaintiff a valuation which they knew to be grossly in excess of that which it in fact bore, and did so with the purpose of making the plaintiff bear a larger share of the burden of the support of the state government than it rightfully should. The contention is made that the board made a grievous mistake in placing so high a value, and that it took into consideration property outside of the state, and gave to the property within a value partly deduced from that without the state. The testimony, however, does not sustain this contention. • • •

“The findings of an official body such as the Board of Valuation and Assessment made—as was the case here—after a hearing and upon notice to the taxpayer, are quasi judicial in their character, and are not to be set aside or disregarded by the courts unless it is made to appear that the body proceeded

upon an erroneous principle or adopted an improper mode of estimating the value of the franchise, or unless fraud appears."

The Court in *Louisville & Nashville Railroad Company v. Greene*, 244 U. S. 523, 536, 542; 61 L. Ed. 1291, says:

"In our opinion, it is a sufficient answer to this contention to say that the board merely carried out the capitalization-of-income plan of valuation, perhaps to its logical extreme, but certainly not in a manner that enables this court to say that they pursued a fundamentally wrong method. * * * a criticism merely of the conclusion of the board upon a question of facts which is not properly subject to review by the courts "

The evidence in this case discloses clearly that the Executive Council of Iowa in the year 1922 proceeded honestly and fairly in an earnest attempt to equalize upon the same relative and uniform percentage the assessed value of farm lands and railroad property, including the property of the carrier.

A similar proceeding had been brought in the District Court of the United States for the Southern District of Iowa in an attack upon the 1921 assessment as made by the Executive Council of Iowa. Subsequently these cases were disposed of upon an agreed settlement which has nothing to do with this case. The fact, however, as to what the law was and as to what was required by the Executive Council is clearly shown in the opinion of the Court rendered at that time and to be found in *C. M. & St. P. Ry. Co. v. Kendall, et al.*, 278 Fed 298.

In the exercise of an honest purpose the Executive Council at once, after such proceeding had been determined, proceeded to inform itself very fully relative to railroad values. This fact is disclosed by the record in

this case. For years the annual reports of the carriers to the Executive Council of Iowa for assessment and taxation have been meager (See Exhibit E, Transcript 206). Realizing this fact, that body in conformity to law, called upon the carriers for a complete statement of facts relative to the value of their several properties from every conceivable standpoint and including operating statistics, gross and net income, physical value, values of stocks and bonds, etc. (See Exhibit F, Transcript 214). The Council did not stop with the information thus disclosed, but proceeded to invite the carriers to appear personally and present evidence or facts which might in any way be considered as reflecting the true value of the properties to be assessed. The carriers, including the appellant, appeared and did present exhibits and arguments. The argument of the carriers as presented to the Executive Council orally are set out in the Transcript. (Transcript 145-152, Exhibit 12.)

Not only did the carriers orally present the matter to the council, but it also presented exhibits as to the value of its properties, which exhibits are almost identical with the proofs offered before the three-judge court. (Compare Exhibit 12, Tr. 142-154.) The carrier also presented evidence relative to land values so that the Executive Council at the time of the assessment had before it the same case as was presented to the three-judge court.

The Executive Council was not even content with this information thus obtained. It went further and secured still further information. The affidavit of E. May Sweeney, Secretary of the Executive Council in charge of taxation matters, states (Transcript 301):

“ * * * the council had before it in connection with the assessment of said railroad properties they had complete statistical reviews and data relative

to the market values of stocks and bonds; the par value of stocks and bonds; gross and net income of the several railroads; the annual reports and additional annual reports of each of the several carriers, including the two carriers in question; also the report for all preceding years of each of said carriers, including said two particular carriers; also the complete assessed value of all classes of property for preceding years; also the reports of said railroad companies, including the two companies in question, the Railroad Commission of the State of Iowa, for the year 1921 and preceding years; also exhibit No. 1, pages 7 to 12, in Ex Parte 74 before the Interstate Commerce Commission of the United States; also the reports of the Railroad Commission of the State of Iowa; the reports of the Executive Council of the State of Iowa; the reports of the Auditor of State of the State of Iowa; also the tentative finding of value by the Interstate Commerce Commission on file with the Governor of Iowa; also copy of letter of L. C. Fritch, Vice President of the Chicago, Rock Island & Pacific Railway Company, to the Board of Railroad Commissioners of Iowa, with reference to the value of Chicago, Rock Island & Pacific Railway property in Iowa; also other matters and things which I do not at this time recall."

It thus will appear that the Executive Council at the time of adjusting the valuation of the properties of the appellant had before it full and complete information and was in a position to determine honestly and fairly a relative value as compared with farm lands.

It is to be observed that the Executive Council could not in the year 1922 change the assessed value of farm lands. It could only seek to reduce the assessed value of railway properties to the same relative percentage. This is exactly what the courts hold it had a right to do and what it ought to do. This is exactly what it did. It may be interesting to note that the Executive Council of Iowa has no authority to raise the assessed value of farm lands

to a basis of 100 per cent. It only has authority to equalize the value as between counties upon the same relative and uniform percentage. In *Pierce v. Executive Council*, 165 Iowa 465, 471, the Supreme Court of Iowa outlines the power of the Executive Council, sitting as a board of equalization, as follows:

"The fourth division of the decree seems to us to be much broader than can be justified under any rule of law with which we are familiar. Save as to an original assessment of railways, etc., the State Board of Review had no other duty than to equalize the assessments among the several counties of the state. It had no power, as we understand, to make original assessments in any of the counties, or to generally increase the assessments in each and all of the counties. Its sole duty, as we understand it, in this respect, was to equalize among the several counties. *Forbes v. McQuiston*, 107 Iowa 651."

The courts have assumed jurisdiction in cases of this character only upon the theory that one class of property has been assessed intentionally, systematically and continuously upon a higher percentage of assessed to actual value than that percentage of assessed to actual value which has been, as a part of the scheme, applied to another class of property. This, because of the fact that the result of the application of a different percentage to the two classes of property has resulted in a denial of the equal protection of the laws to the property owner whose property has been assessed upon the higher basis. This has been so repeatedly announced by this court as to be fundamental. In the case at bar a different situation is presented. The Executive Council of Iowa did not seek to assess the property of the appellant upon a higher percentage than that at which farm lands has been assessed and equalized, but upon the same percentage.

In doing so it did that which would result to each property owner an equal and uniform assessment.

This duty on the part of the assessing board has been repeatedly referred to by the courts. The latest pronouncement thereon is that of Chief Justice Taft in *Sioux City Bridge Co. v. Dakota County, Supra*, wherein he says:

"This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of the statute. The conclusion is based on the principle that where it is impossible to secure both the standards of true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

The appellant before the three-judge court did not attack the good faith of the Executive Council in seeking to equalize upon the same relative and uniform basis by the production of any evidence, unless it be assumed that the proofs of value submitted by it are such as to raise a presumption that the Executive Council did not equalize upon the same relative percentage. The three-judge court has very carefully analyzed the evidence submitted by the appellant as to its values. Without repetition, may we again quote:

"The affidavit of I. A. Hermany (Complainant's Ex. 11) purports to show the value of the entire system on the six bases of par value of stocks and bonds, market value of stocks and bonds, capitalization of net income at 6 per cent, capitalization of net income at 7 per cent, capitalization of government rental at 6 per cent, and value under Ex Parte No. 74. These bases are averaged over a period of five years ending June 30, 1922. Allocation to Iowa is suggested on

six different bases. Using all of these factors and giving equal weight to each, the result is a valuation to Iowa of \$56,953,316.00 as against an assessed value of \$66,950,984.00. The inaccuracy of this result, and, therefore, either of the method or of the figures used is shown by the Rock Island bill which sets out a claimed valuation not in excess of \$40,500.00 per mile in Iowa on a mileage of 2,202.335 miles, or an aggregate Iowa value of \$89,194,567.00. For the moment considering the figures in the exhibit to be true, the council may have taken any single base or any combination thereof which it might deem helpful. It may, also, have used any of the suggested methods of allocation, so long as it included therein the requirements of the Iowa statute that it consider gross earnings and the relative proportion of state and interstate 'business.' However, this affidavit contains no information as to gross earnings. It is, also, for the fiscal instead of the calendar year, which latter is the taxation period. The council might, also, properly have rejected the five year period and taken the single year 1921 or a shorter period than five years. The result possible for Iowa value by employment of the exhibit figures and some one or more of these bases of valuation and allocation might range from more than \$109,000,000.00 to a little less than \$10,000,000.00. If the higher results were accepted by the council, the ratio of assessed value would be slightly over 60 per cent as against 61 plus per cent for farm lands.

As will have been observed these facts were all before the Executive Council, and it is to be presumed that they were given that consideration to which they were entitled.

Again, it may be said in addition to what has been said by the court, that each of the compilations submitted by the appellant are subject to the very grave objection that they are not based upon the actual facts as disclosed by the record.

As opposed to the evidences of value as thus presented,

the state submitted the findings of the Executive Council on the same relative and uniform basis, together with complete data and information relative to the values of the appellant's properties upon which the three-judge court reached the following conclusions:

"There was, however, before the council additional direct evidence of value which might rationally have been considered by it. In fact, the motives of the council could not be successfully attacked had they, in good faith, used that evidence as the basis of the valuation instead of going into the field of suggested theoretical bases of value and methods of allocation. This evidence included the report of the company to the Interstate Commerce Commission of the investment value of its property in Iowa for purposes of physical valuation by the commission; the protest filed by the company to the tentative valuation findings of the Interstate Commerce Commission; and the report of the directors of that railroad to its stockholders. The above report to the commission shows a total valuation of over \$137,500,000. It seems doubtful whether the item therein of 'General Expenditures,' totalling over \$14,300,000.00 should be considered at all for taxation purposes. Excluding this item, however, leaves a balance of over \$123,000,000.00. If this balance be taken as the actual value then the assessment for taxation sinks to slightly over 50 per cent as compared with 61 plus per cent for farm lands.

"The above protest filed by the company with the Interstate Commerce Commission claimed a system value of not less than \$525,000,000.00. From this amount a most liberal deduction for included items not properly to be considered in tax values within the state of Iowa would leave a figure which, allocated by any reasonable method suggested, would apportion to Iowa at least \$100,000,000.00. The assessed value would be 66 per cent thereon as compared with 61 per cent for farm lands. Such narrow difference of percentage might well honestly occur and is slight evidence of fraud.

"In the above annual report to the stockholders for 1921, the statement is made, and supported by figures, that the physical property of the company, as a going concern, exceeds the par value of the outstanding stocks and bonds. This par value is given, in that report, as slightly over \$362,000,000.00. If that be allocated on the mileage basis for 1921 of 29.81 per cent (being one of the methods suggested by this complainant) the Iowa value is something over \$107,000,000.00. To this the assessed value is 61 per cent plus as against 61 per cent plus for farm lands.

"In view of the above possible findings, based on evidence before it, we cannot say that the council intentionally overassessed this property."

(Defendant's Exhibit A-1, Tr. 177; Defendant's Exhibit C, Tr. 187-192; Defendant's Exhibit D, Tr. 192-205; Defendant's Exhibit F, Tr. 214 and side folio pages 557 to 587; Defendant's Exhibit G, Tr. 214, 215 to 222; Defendant's Exhibit K-1, Tr. 224-228; Defendant's Exhibit K-2, Tr. 229, specifically pages 289, 290, 291, 292; Defendant's Exhibit K-3, Tr. 292, 296, 297, 298, 299; Defendant's Exhibit L-2, Tr. 300; Defendant's Exhibit S, Tr. 301; Defendant's Exhibit T, Tr. 302; Defendant's Exhibit X, Tr. 314.)

In addition to the proofs of value thus referred to by the court, reference is made to the affidavits and conclusions of value based upon the record which show clearly that the actual value of the properties of the appellant in Iowa, subject to taxation by the Executive Council, exceeds \$110,000,000.00, which is more than sufficient to sustain the assessment as made by the Executive Council.

In addition to the foregoing evidences of value based upon the value of the physical structures, proofs were introduced as to the intangible values of such properties. These intangible values have to do with such elements of value as good will, connected use and operation, etc. Such

intangible values coupled with the physical values raise the total value of the appellant's property beyond any amount conceivably necessary to sustain the action of the Executive Council.

It follows that the appellant must fail because it has failed to make out a case of intentional discrimination. It must fail further because of the fact that the proofs clearly show that the actual value of the appellant's property is more than sufficient to sustain the assessment in question upon a basis of 61.34 per cent.

It is respectfully contended that this court must and should affirm the order and decree of the three-judge court.

Respectfully submitted,

BEN J. GIBSON, Attorney General,

NEILL GARRETT, Assistant Attorney General,

Counsellors for the Appellee.

OCT 24 1924

WM. R. STANBURY

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1924

No. 23

THE CHICAGO, ROCK ISLAND & PACIFIC RAIL-
WAY COMPANY, *Appellant,*

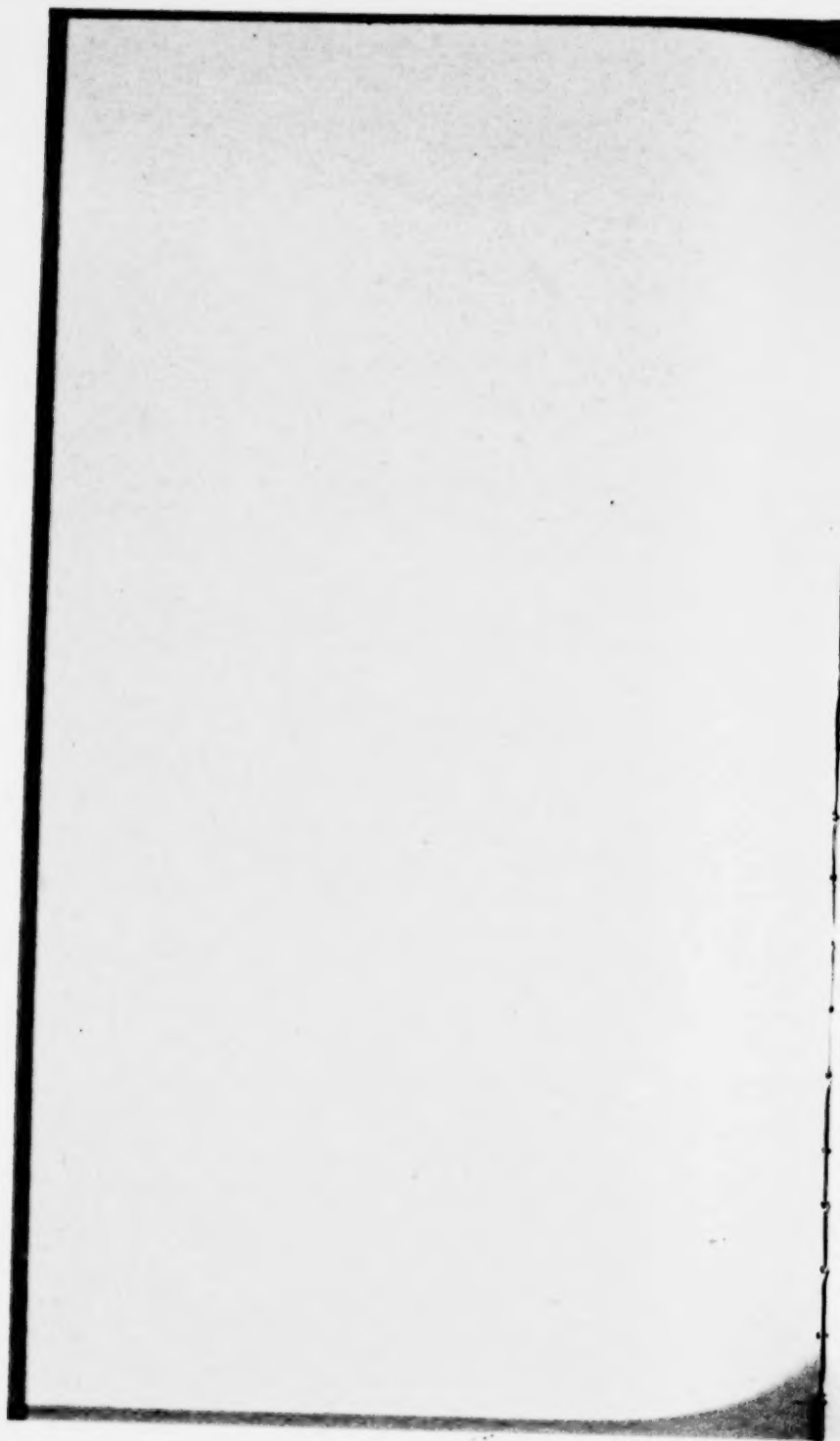
v.

NATHAN E. KENDALL, GOVERNOR OF THE
STATE, ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN
DISTRICT OF IOWA

ADDITIONAL BRIEF FOR APPELLEES

BEN J. GIBSON, Attorney General of Iowa,
NEILL GARRETT, Assistant Attorney General,
Solicitors for Appellees.



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ADDITIONAL BRIEF FOR APPELLEES

STATEMENT

This statement is supplementary to the statement contained in the original brief and argument filed herein by the appellees. The occasion for the filing of this Brief and Argument is unusual and for that reason some reference to the exact situation is necessary.

The appellant failed to file its Brief and Argument prior to the submission of the case. The appellees there-

upon filed a motion to dismiss and affirm which was submitted on the 6th day of October, 1924, and is for determination by the court. The appellees also filed their Brief and Argument. On the 7th day of October, 1924, the case was argued orally. At that time the court granted ten days to the appellant to file a Brief and Argument and gave additional time to the appellees to reply.

For the convenience of the court and for the purpose of particularly emphasizing certain outstanding facts, we call attention to the following:

1. This is an appeal from the findings of a three-judge court constituted under the provisions of Section 266 of the judicial code denying the application of the appellant for a temporary injunction.

2. The assessment complained of was made by the Executive Council of Iowa, which executive council also finally equalizes the values of farm lands. In other words, we are dealing with one board which determines the final assessed value of both classes of property involved, namely, farm lands and railroad properties.

3. There is no evidence of bad faith on the part of the Executive Council of Iowa in equalizing upon the same relative percentage of assessed to actual value. The sole evidence submitted by the appellant being as to the undervaluation of farm lands and the value of its own property.

4. The ratio of assessed to actual value of farm lands is agreed upon at 61.3 per cent. The appellant offers no evidence to show that the Executive Council of Iowa did not in good faith equalize as between the two classes of property upon such basis.

5. There is no evidence in the record to show that the

Executive Council of Iowa intentionally overassessed the property of the appellant. On the other hand, there is ample evidence upon which the executive council might properly find the value of the appellant's property on a basis of 61.3 per cent to be equal to or in excess of the assessed value fixed by it.

6. The evidence clearly shows that prior to the making of the assessment in question the executive council made an exhaustive investigation and research into railway values and particularly of the elements of value of the appellant's properties; that after a hearing in which council for appellant took part, the executive council in assessing appellant's property in Iowa *reduced the assessment* below what it had been for a number of years.

7. There was evidence before the three-judge court upon which it properly denied the application for a temporary injunction.

In connection therewith we submit the following:

a. Exhibit A-1 (Tr. 177) offered by the appellees, is a statement of the value of the property in Iowa of the appellant made by L. C. Fritch, Vice President of the Railway Company in charge of construction, maintenance and capital expenditures. Mr. Fritch stated in said letter that the total value in Iowa as of June 30, 1915, was \$137,557,638. The total additions and betterments in Iowa from June 30, 1915, to December 31, 1921, is shown in Exhibit 2 of Exhibit K-1 (Tr. 227) to be \$11,207,937. These two sums added together produce a value as of date December 31, 1921, of \$148,765,635. To this, the assessed value of \$66,950,984 is 45 per cent, as compared to 61.3 per cent the ratio agreed upon.

b. Exhibit C offered by the appellees is the 42nd An-

Annual Report of the Board of Directors to the stockholders. The whole document was offered in evidence, but only the portion applicable is included in the transcript. (Tr. 187-192.) This exhibit is analyzed by the witness Thorne in his affidavit, Exhibit 4 of Exhibit K-2 (Tr. 239.) The value of that portion of the system which may properly be considered in connection with the taxation of the property of the appellant in Iowa as stated in this analysis amounts to \$362,349,271. The figures contained in this statement it will be noted are adopted by the board of directors as the minimum value of the property of the appellant. It will be noted therein that the board of directors state (Tr. 189) that "this valuation, officially determined by the United States Government, refutes for all time and for all purposes the suggestion sometimes made by the uninformed that this company is over-capitalized. We regard the valuation established by the Commission as being much less than the actual value of the property, and having filed the protest contemplated by law in the hope that, upon a hearing, the Commission will substantially increase its valuation; but, even on the Commission's minimum basis, this valuation must be taken as establishing a property value behind our stocks and bonds, much in excess of their par value."

It will be noted that the values enumerated therein are admitted to be on a minimum basis. Reference is made in the quotation from the report to the stocks and bonds and capital obligations outstanding against the property. These will be referred to later. Attention is also called to the statement in the quotation that the board of directors regards the figures shown by them to be "much less than the actual value of the property" and that they have filed the protest contemplated by law. Reference will be

made to this protest and the values therein claimed later in this statement.

Allocating the figure of \$362,349,271 to the State of Iowa on the mileage proportion basis there is produced in Iowa a value of \$108,016,318. To this, the assessed value is 61.9 per cent, as compared to 61.3 per cent, the ratio agreed upon.

c. Exhibit F (Tr. 214 Fol. 557-565) which is a part of the additional annual report to the Executive Council, contains a statement of the par value of the stocks and bonds of the appellant company. It is there shown that the par value of the stocks and bonds of the system on December 31, 1921 was at least \$355,752,926 after making all possible deductions for securities not properly to be included, as claimed by appellants. This amount allocated to Iowa on the mileage proportion basis produces a value for Iowa of \$106,003,110. However, appellees insist that the correct total amount of stocks and bonds to be considered is of the par value of \$382,814,926. This amount allocated to Iowa on the mileage proportion basis produces a value of \$114,130,292. It will be noted in this connection that the board of directors in its annual report to the stockholders, referred to in the paragraph above, is admitted to be the actual value of the property. To this, the assessed value of \$66,950,984, is 58 per cent, as compared to 61.3 per cent, the ratio agreed upon.

In this connection it is interesting to note that the appellant in its Exhibit I of Exhibit H, Fol. 410, opposite Transcript 136, gives the par value of its stocks and bonds as of June 30, 1922 as \$370,836,650.

d. Exhibit D (Tr. 192) offered by appellees is the protest by the appellant against the valuation of its property

by the Interstate Commerce Commission. This protest and the values therein claimed by the appellant as additional to the valuation made by the Interstate Commerce Commission is analyzed by Mr. Thorne in Exhibit 7 of Exhibit K-2 (Tr. 243-247.) It will be observed that the appellant claims an increase in the physical values of its total properties over that allowed by the Interstate Commerce Commission of approximately \$194,740,092 (Tr. 244.) Of this amount there is in Iowa, specifically designated in the protest, an amount equal to \$34,842,444 (Tr. 246.) Adding this amount to the total value found by the Interstate Commerce Commission as of June 30, 1915, brought down to December 31, 1921, as computed by the appellant in its showing before the Executive Council, Exhibit G in this record (Tr. 214, 215-222) a total claimed value by the appellant is produced amounting to \$129,223,696 in Iowa (Tr. 247.) To this, the assessed value of \$66,950,984 is 51.8 per cent, as compared to 61.3 per cent, the ratio agreed upon.

e. Exhibit T offered by the appellant (Tr. 307) is an extract from the Wettling Exhibits submitted in behalf of the railroads in the western district in May, 1920, in a proceeding known as Ex Parte 74, the purpose of which was to determine the value of the properties of the railroads as a basis for the determination of rates. The portion of that exhibit applicable herein is set out in the transcript page 302. The appellant stated its total value therein to be \$392,426,762. This exhibit was analyzed by the appellee's witness Thorne in Exhibit 3 to Exhibit K-2 (Tr. 238.) In this exhibit, after making the necessary deductions for those properties not properly to be considered in connection with the assessment of appellant's property in Iowa, the resultant value for the sys-

tem is \$374,308,331. On the hearing the Interstate Commerce Commission adopted a value which should be used by it by reducing the value presented by the appellant by 9.64 per cent. This produced a final value of \$338,225,008. This value allocated to Iowa on the mileage proportion basis produces a value of ~~\$8,123,475~~ ^{20,014,771}. To this, the assessed value is 60 per cent, as compared to 61.3 per cent, the ratio agreed upon.

f. Appellee's Exhibit K-1 (Tr. 224-228) shows a total physical value in Iowa based upon the tentative valuation report and the reports to the Executive Council and the Railroad Commission of Iowa by the carrier brought down to date December 31, 1921, of \$114,478,401. The assessed value bears to such value a ratio of 57.7 per cent as compared to 61.3 per cent.

g. To all the physical values of the property of the appellant there should be added an intangible value representing the going concern value, franchise value, the value of good will, earning power and the value of unity of use and connected operation.

Mr. Thorne in Exhibit K-2 extensively analyzes the intangible values of the appellant's property. Exhibit 9 of Exhibit K-2 (Tr. 280) is a computation by Mr. Thorne computing the intangible value of the property of the appellant as of date December 31, 1921, as being \$11,701,783. This intangible value is based upon the earnings and physical valuation of appellant's property.

Exhibit 10 of Exhibit K-2 (Tr. 282) is another computation of the intangible value of the appellant's property on a different basis. There are other computations of intangible values but the one relied upon by the state is the one just described. While any of the physical values hereinbefore described are sufficient to sustain the assess-

ment by the Executive Council on the basis of 61.3 per cent of actual value the addition of the intangible value necessarily inherent in the property removes any question as to the adequacy of the assessment. This intangible value added to any of the physical values suggested (the basis of which were before the Executive Council and the District Court) produces a value so great that there is no question about the correctness of the assessment made.

There are a number of other computations of the value of the appellant's property in the record but we do not desire to go into detail further on this point as we believe what we have outlined is sufficient to show that the Executive Council, as well as the court below, had before them sufficient facts and evidence upon which to make the assessment in question and that they were justified in fixing the assessed value of the appellant's property at the amount fixed.

BRIEF

I

Under the laws of Iowa the Executive Council sits as one board vested with power and charged with the duty as a board of assessment, equalization and review to equalize the assessed values of property, including both lands and railroad property.

Sees. 1377, 1378 and 1379, Code 1897, as amended;
Sees. 1334, et seq. Supplement to Code, 1913.
(These sections are set out in full in the Appendix.)

II

The Executive Council of Iowa, sitting as a State Board of Equalization, has no power to generally increase

the assessments in all of the counties. Its sole duty is to equalize upon a uniform ratio.

Pierce v. Executive Council, 165 Iowa 465, 471;
Montis v. McQuiston, 107 Iowa 651.

ARGUMENT

I

It is first contended that there is evidence sufficient to disclose the fact that farm lands have been assessed at less than 100 per cent for a number of years. There is no controversy on this proposition. In other words, all of the evidence as to the underassessment of farm lands submitted by the appellant is immaterial because it is agreed by the parties that the assessed value of farm lands bears, to the actual value, a ratio of approximately 61.3 per cent. The trial court so found.

The fallacy of the appellant's argument lies in the fact that the issue here is not whether farm lands were assessed on the basis of 61.3 per cent, but whether the evidence discloses clearly that the property of the appellant was assessed as a part of a systematic scheme at a higher percentage of actual value. There is not the slightest evidence in the record to show that railroad property was assessed at a higher percentage of actual value than farm lands. In truth, the evidence discloses exactly the opposite, namely, that the Executive Council of Iowa sought to equalize upon the same relative and uniform percentage as between the two classes of property. This is exactly what they should have done and this is exactly what they did. *Sioax City Bridge Company v. Dakota County*, 200 U. S. 441.

The appellant cites a number of cases, including the following: *Sioax City Bridge Company v. Dakota*

County, 260 U. S. 441; *L. & N. R. R. Co. v. Greene*, 244 U. S. 522; *Taylor v. L. & N. R. R. Co.*, 88 Fed. 350. In each of the cases cited the court assumed jurisdiction upon the theory that one class of property had been assessed intentionally, systematically and continuously upon a higher percentage of assessed to actual value than that percentage of assessed to actual value which has been as a part of the scheme applied to another class of property. This, because of the fact that the result of the systematic application of a different percentage to the two classes of property resulted in a denial of the equal protection of the laws to the property owner whose property has been assessed upon the higher basis. This rule has been so repeatedly announced by this Court as to be fundamental. As we have heretofore stated, a different situation is presented in the case at bar. The Executive Council of Iowa did not seek to assess the property of the appellant upon a higher percentage than that at which farm lands had been by it equalized, but upon the same percentage.

Under the laws of Iowa the Executive Council sits as a board of assessment, equalization and review. It is vested with power, not only to assess railroad property, but also to equalize the assessed value of farm lands, Iowa Code Supplement, 1913, Sections 1334 et seq., Iowa Code, 1897, Sections 1377, 1378, and 1379.

A clear distinction exists between cases such as this, where one board fixed the final assessed value of both classes of property and a case where different boards do so. In such cases the presumption is that the board does that which it ought to do, namely, equalizes upon the same relative and uniform percentage, thus following the law and the constitution.

A different situation is presented where two boards

act. In such cases as a primary base, it is assumed that each follows the law and assesses upon a basis of 100 per cent. Proof of the undervaluation as a part of a systematic scheme of discrimination of a large class of property by one board would, in such cases, be sufficient, unless it be shown that the other board assessed upon the same percentage. In the case at bar, therefore, we begin with the conclusion that the Executive Council of Iowa did that which it ought to do under the law, namely, equalized as between the two classes of property.

Aside from the presumption to which we have referred, are also the proofs which show clearly that the Executive Council of Iowa did assess the appellant's property upon the same relative and uniform basis of assessed to actual value. (See original Brief of Appellees. See also appellees Motion to Dismiss and Affirm.)

In this connection attention is specifically called to the fact that after the most exhaustive study of the question (see Brief for Appellees, pages 50, 51 and 52), the assessing board finally reduced the assessed value of the appellant's property from \$31,000 per mile to \$30,400 per mile. The showing of good faith and the honest purpose on the part of the assessing board is complete, and negatives the claim that there was an intentional systematic discrimination.

II

Counsel for appellants refer repeatedly to the adoption by the assessing board of a wrong method. Such is not this case. There is no question involved of the adoption of a wrong method in fixing the value of the complainant's property. No allegation thereof is contained in the pleadings and no proofs were offered before the court. The sole question involved is did the Executive Council

of Iowa intentionally, systematically and continuously and as a part of a scheme assess the appellant's property upon a higher relative ratio of assessed to actual value than that applied to farm lands?

III

MARKET VALUE OF STOCKS AND BONDS

Counsel for appellant further contends that net income and the market value of its stocks and bonds are to be considered in determining the value of its property. With this contention we quite agree. There is no doubt but that both net income and the market value of its stocks and bonds are to be given weight in determining the value of a railroad property. The weight to be given, however, is within the sound discretion of the board specially vested, under the law, with power to fix the value. The value of a railroad property is not to be determined by the consideration of any one element, but by the giving of consideration to every element of value. The weight to be given each factor is one to be determined by the tribunal authorized under the law to find the value.

The evidence clearly discloses that the market value of stocks and bonds of the appellant's property as well as the net income for years was before the assessing board, and was given proper weight. (Exhibit S, Tr. 301.) It is fundamental that the court will not substitute its judgment for that of the tribunal, especially vested under the law with power to fix the value for assessment purposes. In this connection it may be interesting to note that in all of the cases determined by this court (save those cases involving the adoption of a wrong method), the court had uniformly adopted the value fixed by the assessing board

and, where relief has been granted, has simply applied to such value the proper percentage. (See cases cited, Brief for Appellees Division 3-A.)

Counsel for appellants, however, would have the court disregard every element of value and find the value, substituting it for the value fixed by the assessing board upon the sole basis of the market value of its stocks and bonds and certain sums averred to be the net income for a period of five years, capitalized. This contention is clearly erroneous and, it would seem, needs no answer.

To fix the value of a railroad property upon the sole basis of the market value of its stocks and bonds is fundamentally incorrect. Especially is this true in the case at bar. The period of time used is the five years immediately preceding December 31, 1921. This was an abnormal period and therefore an unfair period to use in determining the true value of securities.

Again, all of the securities of a railroad system are not bought and sold on the market in bulk. Only small, little fractions, ranging from one three-hundredths of one per cent to possibly one per cent are bought and sold. No investor will pay for a single share of stock or a single bond, dependent as it is on the policy of the company, what would be paid for the controlling interest in the company. Whenever the controlling interest is sold openly, the market value of its shares of stock increases by leaps and bounds, and in many instances exceeds by far the value of the properties of the company.

The single share of stock does not carry with it any semblance of control. It is not the property of the railroad which the purchaser buys, but an infinitesimal interest in the corporation. The purchaser is buying corporate policy as distinguished from the property of the corporation.

Again, the market value of stocks and bonds is dependent upon the rate of interest and dividends and interest paid. If the property of the corporation is worth one hundred cents on the dollar, the bond secured by the property is not necessarily worth one hundred cents on the dollar. There may be no connection between the market value of the securities and the value of the property back of the securities. An underlying bond, backed by property equal or exceeding in value its face, paying 7 per cent, might sell above par, whereas the same bond, secured by precisely the same property, paying an interest rate of 3 per cent would not sell at over sixty cents on the dollar. The value back of the property may be ample and sufficient to pay it, yet the rate of interest, the length of time it runs, and other factors have great weight in determining the value of the obligation in the market.

Again, as in the case at bar, a company may husband its resources, putting its income, gross and net, back into the property instead of paying it out by way of dividends, and it may have an established reputation of this kind. Inevitably, such a policy depresses the value of its stocks as compared to a company which pays larger dividends.

The market value of stocks and bonds fluctuate enormously, especially in abnormal times. This may be due to stock manipulations. It may be due to the flooding of the market with other securities. Whatever be the cause, the fact remains that stocks and bonds during the five years in question fluctuated very greatly. Again, if the company has a reckless history or absorbs, consolidates and reorganizes constantly, as in this case, we care not how valuable the property is, the market value of its securities is low.

The distinction always to be kept in mind is that the share of stock as property is entirely different from the

property of the corporation. The minority stockholder, and it is always the minority of stock that is sold, is helpless and wholly dependent upon the corporation in which he holds stock. Therefore, the wise investor is always cautious in purchasing stock to investigate not so much the value of the property of the corporation, as the policy of the company.

We have given consideration to a great many cases in which, as stated, the market value of stocks and bonds is given some weight. The following summary, we believe, will be found accurate:

1. Such decisions are relative very few in number.
2. In those rare exceptions where the market value of securities is given consideration, it is only considered incidentally, and is not controlling.
3. It is only in old cases that it is given any serious consideration.
4. It is never given controlling consideration where other factors are available.

See *Des Moines Water Company v. City of Des Moines*, 192 Fed. 193, 196; *People v. Commissioners of Taxes and Assessments*, 23 N. Y. 192; *People v. Coleman*, 126 N. Y. 433; *M. W. & S. R. Co. v. Morley*, 198 Fed. 991.

EARNINGS

Counsel for appellants in addition to its contentions relative to the market value of its securities refer to its affidavits showing the value of its properties arrived at by the capitalization of what it is pleased to term its net income.

As we have already stated, there is no doubt but that the net income is to be given consideration in determining

the final value of the appellant's property. The weight to be given it is to be determined by the assessment board. The evidence of net income is subject to many grave objections, among which are the following:

The period of time used was five years preceeding July 1, 1921. No consideration is given to the net income for the entire year 1921, whereas the value for assessment purposes is to be fixed as of date December 31, 1921.

Again, the period of time used was abnormal in character. In the year 1918 the Government took over and operated the railroads of the nation. The period of Government operation continued until March 1, 1920. The wages paid railroad workers and the cost of materials used increased during that period out of all proportion to the increase in freight rates. This was due partly to the fact that the Government operated the railroads primarily for the purpose of winning the war and not for the purpose of making profit. In a larger sense, perhaps, we may say that conditions changed so rapidly that changes in the freight rates in the very nature of things could not keep pace. This condition was recognized by Congress in the enactment of the Transportation Act in 1920 and by the Interstate Commerce Commission in its order increasing passenger fares, charges and freight rates. Such increased fares, charges and rates were by specific act of Congress to be fixed so that there would be a return to the carriers of 6 per cent upon the actual value of the properties used and useful for transportation purposes. The value used as to this carrier is shown by Exhibit T. (Tr. 302) as \$362,426,762. This value was finally by the Interstate Commerce Commission reduced 9.64 per cent. Such value was the earning value. We have already herein used such value and as shown it is more than suffi-

cient to sustain the assessment of the Executive Council on the basis of 61.3 per cent, the ratio agreed upon.

Again, the figures used for net income are taken arbitrarily from the books of the carrier and do not give any consideration to the normal or reasonable operating expense.

Without extending this argument on this point further, we make the final observation that the net income of this carrier was given consideration by the Executive Council of Iowa in fixing the assessed value in question, and its determination of the weight to be given is final.

Counsel cites two Iowa cases in which it is contended that net income is to be given consideration. As will have been observed, we do not question this fact. However, neither of the cases cited, namely, *City of Marion v. C. R. & M. R. R. Co.*, 129 Iowa 259 and *Marshalltown L. P. & R. Co. v. Wilke v.*, 187 Iowa 165, are not in point. Both of these cases are appeals from the action of a local board of review. Under the laws of Iowa the District Court, as well as the Supreme Court, is vested with authority to increase or reduce assessments. In other words, the Court sits as an appellate assessment tribunal. A clear distinction lies between such cases and cases in which there is a collateral attack upon the action of an assessing board. Again, both of these cases hold that while net income is to be given consideration, it is not controlling. With this contention we quite agree. Again, both of these cases are under the general statute and are assessed at the market value of the property. As will have been noted by reading the original brief for appellees filed herein, it is not the market value of a railroad property that is to be considered as the assessment base, but rather the actual value of the property which is arrived at by

taking into consideration, first, the value of the structures, and then adding thereto the intangible values.

In direct contradiction of the contentions of the appellant, attention is called to the recent case of *Union Pacific Ry. Co. v. Council Bluffs*, (Iowa) 175 N. W. 6, in which the Court sitting as an appellate tribunal in assessments refused to take net income as the basis for fixing value, but used rather the original cost less depreciation. A capitalization of net income in such case would have resulted in a grossly increased figure over that finally determined upon by the Court and, as the Court properly said, it would far exceed the actual value of the property. The point we make is that net income is always to be given consideration as is gross income, the weight to be given each depending upon all of the facts and circumstances, and the determination of the matter honestly arrived at by the board will not be interfered with by the courts.

It may be interesting to note that if net income be taken and if the figures of the complainant carrier be used for certain of the years, particularly the year 1920, there would be no value to this property. Such a contention is absurd and foolish.

CONCLUSION

We have already extended this argument to an extreme length, but feeling as we do that when an assessment board in good faith seeks to equalize the assessed value of property, gives consideration to every contention made by the carriers, makes an exhaustive study of the problem in order to provide equality, that its action should not be overturned. In the case at bar we submit that the trial court was correct in its determination that the evidence was insufficient to show an intentional, systematic dis-

crimination and that its determination and interlocutory decree should be and must be affirmed.

Respectfully submitted,

BEN J. GIBSON, Attorney General,

NEILL GARRETT, Assistant Attorney General,
Solicitors for the Appellees.

APPENDIX

"Sec. 1377. Abstract. Each auditor shall, on or before the third Monday in June, make out, and transmit to the auditor of state an abstract of the real and personal property in his county, in which he shall set forth:

1. The number of acres of land and the aggregate actual and taxable values of the same, exclusive of town lots, returned by the assessors, as corrected by the county board of review;

2. The aggregate actual and taxable values of real estate in each township, city and town in the county, returned as corrected by the county board of review;

3. The aggregate actual and taxable values of personal property;

4. An abstract as to the number and value of all animals as the same are returned by the assessor, showing the aggregate actual and taxable values and number of each kind or class, and such other facts as may be required by the state board of review."

"Sec. 1378. State board of review. The executive council shall constitute the state board of review, and shall meet at the seat of government on the second Monday of July in each year. The auditor of state shall be the clerk of the board, and shall lay before it the abstracts transmitted to him by the auditor, as required by the preceding section."

"Sec. 1379. Ch. 139, 37th G. A. Adjusting valuation in counties. It shall adjust the valuation of property of the several counties, adding to or deducting from the valuation of each kind or class of property such percentage in each case as will bring the same to its taxable value as fixed in this chapter, but before such executive council shall add to the valuation of any kind or class of property any such percentage, it shall serve ten days' notice by mail, on the auditor of the county whose valuation is proposed to be raised and shall hold an adjourned meeting after such ten days' notice, at which time such county may appear by its board of supervisors, county

attorney, or otherwise, and make written or oral protest against such proposed raise, which protest shall consist simply of a statement of the error, or errors, complained of with such facts as may lead to their correction, and at such adjourned meeting final action may be taken in reference thereto."